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In the Supreme Court of the United States

OCTOBER TERM, 1988

C. WILLIAM VERITY, JR., SECRETARY OF COMMERCE, ET AL., PETITIONERS

v.

CENTER FOR ENVIRONMENTAL EDUCATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Marine Mammal Protection Act of 1972, 16 U.S.C. (& Supp. IV) 1361 *et seq.*, which authorizes the Secretary to issue permits in specified circumstances for the taking of marine mammals incidental to commercial fishing (see 16 U.S.C. (& Supp. IV) 1371(a)(2)), prohibits the Secretary from issuing a permit for the incidental taking of a nondepleted species of marine mammal when the same fishing activities will result in the incidental taking of another species for which a permit cannot lawfully be issued under the Act.

PARTIES TO THE PROCEEDING

The petitioners are C. William Verity, Jr., in his official capacity as Secretary of Commerce, William E. Evans, in his official capacity as Undersecretary for Oceans and Atmosphere, James W. Brennan, in his official capacity as Assistant Administrator for Fisheries, National Marine Fisheries Service, Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, and the Secretary of Transportation.

The respondents are the Center for Environmental Education, Greenpeace U.S.A., The Humane Society of the United States, The Whale Center, Animal Protection Institute, Society for Animal Protective Legislation, Kokechik Fishermen's Association, Aulayaat Fishermen's Association, Alaska Sportfishing Association, Sierra Club, Joseph Chimegalria, on behalf of himself and all persons similarly situated, and Federation of Japan Salmon Fisheries Cooperative Association.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of C. William Verity, Jr., Secretary of Commerce, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-31a) is reported at 839 F.2d 795. The opinion of the district court (App., *infra*, 32a-57a) is reported at 679 F. Supp. 37.

JURISDICTION

The court of appeals entered its judgment (App., *infra*, 62a-63a) on February 16, 1988. A timely petition for rehearing was denied (App., *infra*, 64a-67a) on May 11, 1988. On July 28, 1988, Chief Justice Rehnquist extended the time within which to file a petition for a writ of cer-

tiorari to and including September 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. 1361, provides, in relevant part:

> The Congress finds that –
>
> (1) certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities;
>
> (2) such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. * * *

Section 101(a)(2) of the MMPA, 16 U.S.C. (& Supp. IV) 1372(a)(2), provides, in relevant part:

> There shall be a moratorium on the taking and importation of marine mammals and marine mammal products * * * except in the following cases:
>
> * * * * *
>
> (2) Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefor under section 1374 of this title subject to regulations prescribed by the Secretary in accordance with section 1373 of this title. In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate * * *.

Section 103(a) of the MMPA, 16 U.S.C. 1373(a), provides, in relevant part:

> The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, shall prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of individuals within population stocks) as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in section 1361 of this title.

Section 104 of the MMPA, 16 U.S.C. 1374, provides, in relevant part:

> (a) **Issuance**
>
> The Secretary may issue permits which authorize the taking or importation of any marine mammal.
>
> (b) **Requisite provisions**
>
> Any permit issued under this section shall—
>
> (1) be consistent with any applicable regulation established by the Secretary under Section 1373 of this title, and
>
> (2) specify—
>
> (A) the number and kind of animals which are authorized to be taken or imported,
>
> (B) the location and manner (which manner must be determined by the Secretary to be humane) in which they may be taken, or from which they may be imported,
>
> (C) the period during which the permit is valid, and
>
> (D) any other terms or conditions which the Secretary deems appropriate.

STATEMENT

Petitioners seek review of a decision setting aside a regulation and permit issued by the Secretary of Commerce for the taking of Dall's porpoise incidental to the fishing activities of the Federation of Japan Salmon Fisheries Cooperative Association (Federation). The court of appeals ruled that the Secretary lacks authority under the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. (& Supp. IV) 1361 *et seq.*, to issue a permit for an incidental taking of one species unless he concludes that permits are likewise warranted for the incidental taking of any other species that would be affected by the same fishing activities.[1]

1. The MMPA prescribes the circumstances under which marine mammals may be "take[n]"—that is, harassed, hunted, captured, or killed (16 U.S.C. 1362(12))—in United States waters. With certain exceptions, the MMPA imposes "a moratorium on the taking" of marine mammals (16 U.S.C. (& Supp. IV) 1371(a)), and therefore makes it unlawful for any person to take any marine mammal in waters that are subject to United States jurisdiction (16 U.S.C. (& Supp. IV) 1371(a)). Persons who violate this stricture are subject to civil penalties of up to $10,000 per taking (16 U.S.C. 1375(a)(1)), and the cargoes of vessels that are employed in the unlawful taking of marine mammals are subject to seizure and forfeiture (16 U.S.C. 1376). In addition, knowing violations of the MMPA may be prosecuted as criminal offenses (16 U.S.C. 1375(b)).

The MMPA contains an exception, however, that allows the Secretary of Commerce to issue permits authorizing specified takings that are incidental to com-

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[1] On May 31, 1988, we applied to this Court for a stay (No. A-906) pending the filing and disposition of a petition for a writ of certiorari. On June 9, 1988, the Court denied our stay application.

mercial fishing (16 U.S.C. (& Supp. IV) 1371(a)(2)). The Secretary must issue such permits pursuant to regulations that have been promulgated "on the basis of the best scientific evidence available," and he is directed to "prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal * * * as he deems necessary and appropriate to ensure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in [16 U.S.C. 1361]" (16 U.S.C. 1373(a)). Section 1361, in turn, provides that species and population stocks "should not be permitted to diminish below their optimum sustainable population" (OSP), a term that is defined to mean a range above "the number of animals which will result in the maximum productivity of the population or the species" (16 U.S.C 1362(8)). Hence, no permits may be issued for the incidental taking of "depleted" stocks, which the Act defines as a stock that is below its OSP (16 U.S.C. 1362(1)(A)). Consistent with regulations that he promulgates under Section 1373, the Secretary may issue permits "which authorize the taking or importation of any marine mammal" (16 U.S.C. 1374(a)), and that specify "the number and kind of animals which are authorized to be taken" (16 U.S.C. 1374(b)(2)(A)).

Pursuant to Section 14(c) of the North Pacific Fisheries Act of 1954, 16 U.S.C. (Supp. V 1981) 1034(c)), "[a]fter June 9, 1981, the taking of marine mammals incidental to fishing operations by Japanese vessels within the fishing conservation zone shall be regulated pursuant to the [MMPA]."[2] The "fishing conservation zone," now known

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[2] The International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952 (INPFC), 4 U.S.T. 380, T.I.A.S. No. 2786, which was signed by Canada, Japan, and the United States in 1952 and became effective in 1953, generally governs the Japanese high seas gillnet salmon fishery. Pursuant to the INPFC, Japan agreed

as the "Exclusive Economic Zone" (EEZ), is a 200-nautical-mile-wide zone first asserted by the United States in 1976. The Japanese salmon fishing vessels operating in that area consist of fleets of "catcherboats" operating from "motherships." The catcherboats set "gillnets" that are approximately 15 kilometers long and 8 meters deep, at dusk, and retrieve them in the morning. See App., *infra,* 41a.

Dall's porpoise is a species of porpoise that inhabits the Northern Pacific Ocean and the Bering Sea. Because the food sources of the Dall's porpoise are like those of salmon, the gillnet fishery for salmon incidentally takes some individual Dall's porpoises. Northern fur seals may also be incidentally taken because they feed on the salmon and, as a result, sometimes get entangled in the gillnets holding salmon. Approximately nine out of ten fur seals that become entangled are subsequently freed and released

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to refrain from fishing for salmon in eastern portions of the North Pacific and the Bering Sea where salmon of North American origin were more likely to be caught. Congress implemented the INPFC in enacting the North Pacific Fisheries Act of 1954 (NPFA), 16 U.S.C. 1021 *et seq.* The NPFA was amended in 1978 to conform to a protocol to the INPFC signed by the three nations in the aftermath of the United States' assertion in 1976 of a 200-nautical-mile Fisheries Conservation Zone, now known as the Exclusive Economic Zone (EEZ). Under the new protocol, the eastern boundary of the Japanese fishery was shifted westward to 175° E longitude and, as a result, the protection of North American origin salmon was extended to a 775,000-square-mile area outside of the U.S. EEZ. The Japanese fleet was permitted to fish for salmon in an area of about 80,000 square miles within the U.S. EEZ, limited to the period from June 10 to July 31 and targeted on Asian origin salmon. More recently, the three nations entered into a further INPFC agreement in 1986 under which some Japanese fishing in the Bering Sea beyond the 200-mile limit of the U.S. EEZ will be phased out during the seven-year period ending in 1994. The purpose of this restriction is to decrease the unavoidable interception of North American origin salmon in the area.

unharmed (App., *infra,* 22a n.4) The fishery less frequently captures other species of marine mammals, including northern (Steller) sea lions, Pacific white-sided dolphin, harbor porpoise, and killer whale.

In 1981, the Secretary, acting through the National Oceanic and Atmospheric Administration (NOAA), issued the Federation a three-year permit authorizing annual takes of 5500 Dall's porpoise, 450 northern fur seals, and 25 northern sea lions during salmon operations (see 50 C.F.R. 216.24(d)(5)(vii); App., *infra,* 4a). Although the Japanese salmon fishermen had also requested that the incidental take permit include 50 harbor porpoises, 25 white-sided dolphins, and 25 killer whales, those species were not included in the permit because insufficient information existed in the permit application and in scientific literature to attempt review of the status of those species (see 46 Fed. Reg. 27057 (1981)). In 1982, Congress extended the 1981 permit through June 9, 1987, while simultaneously directing the Secretary to place representatives on Japanese vessels operating within the EEZ to collect data concerning the taking of marine mammals (16 U.S.C. 1034(a) and (b); App., *infra,* 4a).[3]

In 1986, the Federation applied to NOAA for a five-year extension of its 1981 permit (App., *infra,* 5a). After a

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[3] Congress also directed the Secretary to adopt requirements for the purpose of ensuring that new fishing gear or techniques would be implemented to reduce porpoise mortality by the greatest extent practicable (16 U.S.C. 1034(a)(1)). In addition, Congress required the introduction of new fishing gear or techniques, for the entire Japanese fleet "to be eligible for a new permit for the period after June 9, 1987" (16 U.S.C. 1034(a)(2)(D)). Finally, Congress required the Japanese to provide funding for continued joint research on marine mammals incidentally taken in the Japanese salmon fishery, and to continue cooperative research on marine mammals and seabirds (16 U.S.C. 1034(e)-(f)).

hearing, an administrative law judge (ALJ) concluded that a permit should issue that would permit incidental takings in 1987 of 1750 Dall's porpoise and 45 northern fur seals from the Commander Islands stock (App., *infra,* 6a).[4] The Secretary subsequently modified the ALJ's decision, concluding that the Federation should be awarded a three-year permit that authorized the aggregate taking of 789 Dall's porpoise from the Bering Sea and 5250 from the North Pacific Ocean (52 Fed. Reg. 19874 (1987); App., *infra,* 7a-8a).

The Secretary also concluded, however, that the MMPA precluded the issuance of a permit that would authorize the taking of northern fur seals (52 Fed. Reg. 19875, 19877-19878 (1987); App., *infra,* 8a). The Secretary expressed his "confidence in [the ALJ's] conclusion that an annual take of 45 sub-adult male Commander Islands fur seals will not adversely affect a population that is subject to a managed commercial harvest [in the Soviet Union] of 4,000 to 5,500 animals per year," but agreed with the Marine Mammal Commission that "the MMPA requires an affirmative finding by the agency that a stock is within its OSP before a permit may be issued" (52 Fed. Reg. 19878 (1987)). Hence, because the Pribilof Islands stock was depleted and because there was insufficient record information to allow a determination whether the Commander Islands seal population was at its OSP, the Secretary concluded that "the permit will not include any

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[4] Two stocks of northern fur seals are involved in this case: the Commander Islands stock and the Pribilof Islands stock. The total population estimate for northern fur seals is approximately 1,200,000. See 51 Fed. Reg. 47158 (1986). The Secretary has recently declared the Pribilof Islands stock, which is estimated to include 800,000 members, as "depleted," within the meaning of the Marine Mammal Protection Act. See 53 Fed. Reg. 17888 (1988). As described in the text below, the status of the Commander Islands stock, which is located in the Soviet Union, is unknown.

northern fur seals" (*ibid.*). The Secretary further noted that, absent a permit, the Federation would be liable for civil penalties under the MMPA for the taking of any seals and stated that "[t]he MMPA's prohibitions will be enforced * * *" (*ibid.*).

2. Respondents, the Center for Environmental Education, et al., and Kokechik Fishermen's Association, et al., filed petitions for review of the Secretary's issuance of the permit in the United States District Court for the District of Columbia pursuant to the MMPA, 16 U.S.C. 1374(d)(6). The district court granted respondents' motion for a preliminary injunction and barred the Secretary from issuing the permit to the Federation (App., *infra,* 32a-57a). The court found respondents' "claims to be meritorious" and thus concluded "that they have a substantial likelihood of success on the merits" (*id.* at 48a). The court explained that "the permit issued appears to be invalid under the MMPA because a finding that all the marine mammals the Secretary knows will inevitably be taken are at or above their optimum sustainable population level has not been made" (*id.* at 51a). The court rejected the Secretary's contention that the civil penalty provisions of the MMPA are a sufficient mechanism provided by Congress for redressing any incidental taking by the Federation of a species not covered by the permit (*id.* at 53a-54a). Finally, the court concluded that the issuance of a preliminary injunction was also warranted because the Federation's fishing could irreparably harm marine mammals, the Federation would suffer only economic harm, if any, as a result of an injunction, and the public interest favors the protection of the environment over the economic well-being of commercial fishermen (App., *infra,* 55a-57a).

3. The court of appeals affirmed (App., *infra,* 1a-16a). The court agreed with the district court that the

MMPA prevents the Secretary from issuing a permit for the taking of *any* species or stock unless he simultaneously issues a permit for the taking of *all* species that will be affected by the fishing activity (*id.* at 14a-16a). The court stressed that "[u]nder the MMPA, before a permit authorizing a taking may be issued, the Secretary 'must be assured that the taking . . . is in accord[ance] with sound principles of resource protection and conservation as provided in the purposes and policies of this chapter . . .' " (*id.* at 10a, quoting 16 U.S.C. 1371(a)(3)(A)). The court acknowledged that "[w]hile the Act may not prohibit issuance of a permit where there is only a very remote possibility that marine mammals for which an optimum sustainable population has not been determined may be taken incidental to commercial fishing, such a situation is clearly not the case here * * * [because] it is readily apparent that the taking of these marine mammals is * * * a certainty" (*id.* at 12a).

The court of appeals, like the district court, also rejected the Secretary's reliance on the MMPA's civil penalty provisions (App., *infra,* 14a). Instead, the court ruled, the Secretary must "take a systemic view of an activity's effect on marine mammals" (*ibid.*). "A view that the permit process functions merely to determine which takes will be exempted from civil penalities," the court elaborated, "is inconsistent with this duty because it allows—subject to the civil penalty price—illegal takings of other protected marine mammals" (*ibid.*).

Judge Starr dissented (App., *infra,* 17a-31a). He reasoned that "[a]lthough the text of the statute does not provide a definitive answer to this question, the overall statutory scheme contemplates precisely the construction given by [the Secretary]" (*id.* at 18a). Judge Starr explained that Sections 1373 and 1374 of the MMPA "plain-

ly envision[ ] that [the Secretary] will issue permits on a species-by-species basis" (App., *infra,* 19a), and that the legislative history of the MMPA likewise supports the Secretary's position (*id.* at 23a). Judge Starr further explained that, since fishermen cannot know in advance precisely how many animals of a given species they will take, the permit system—which authorizes the taking of precise numbers of mammals—necessarily reflects an understanding that animals in excess of the authorized number occasionally will be taken (*id.* at 20a). Finally, Judge Starr, noting that Congress directed the Secretary to take account of a variety of objectives in administering the MMPA, stated that he would have deferred "to the reasonable resolution" of the question here "by the agency charged by Congress with the task of resolving it" (*id.* at 25a).

REASONS FOR GRANTING THE PETITION

In rejecting the Secretary's longstanding construction of the permitting provisions of the Marine Mammal Protection Act of 1972 (MMPA), the court of appeals departed from this Court's teachings in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), and converted the carefully crafted legislative compromise embodied in that Act into a rigid and unworkable law. In the MMPA, Congress struck a balance between the competing societal interests in marine mammal protection and commercial fishing. Congress imposed a general moratorium on the taking of marine mammals, but allowed the Secretary to issue permits excluding from that moratorium takings of a species incidental to commercial fishing that would not "disadvantage" the species and its population stocks (16 U.S.C. 1373(a)). Congress subjected those who violate the moratorium by taking a marine mammal in the absence of a permit to severe civil

penalties and the possibility of criminal prosecution (16 U.S.C. 1375(a)(1) and (b)).

Under the court of appeals' view, however, the Secretary of Commerce may properly determine that the incidental taking of a particular species will not disadvantage the species and its population stocks, yet nonetheless be barred by the MMPA from issuing a permit for such a taking. The court of appeals grafted onto the MMPA an additional permitting requirement, reflected nowhere in its statutory language or legislative history, that upsets the equilibrium reached by Congress. The court held that the Secretary can issue a permit for the incidental taking of one particular species only if he is also able to determine that a permit can likewise issue for the incidental taking of any *other* species that will be encountered during the same commercial fishing activities.

The court's reconstruction of the MMPA's permitting provisions would have dramatic and, quite possibly, perverse results. The Secretary is frequently, as in this case, unable to issue a permit for the taking of all species that might be encountered during commercial fishing activities. Hence, the practical effect of the court's ruling in those instances would be to shut down large segments of commercial fishing by both domestic and foreign entities (such as the Federation in this case) in United States waters. Thousands of commercial fishermen would either have to forgo fishing altogether or be subject to huge civil penalties based, in large part, on their incidental takings of marine mammals that the Secretary has determined pose no threat to the species. In this case, for instance, the Federation would be subject to a civil penalty of $10,000 per taking for each of 6039 Dall's porpoise, even though the Secretary had concluded (and the court of appeals did not dispute) that that amount could be taken without "disadvantage" to the species.

The longer term effect of the court's ruling, moreover, could well be to disserve its intended purpose of bolstering protection of marine mammals. The decision may prompt foreign nations, such as Japan, to avoid the strictures of the MMPA by fishing outside United States waters, thus undermining the very international cooperation that Congress recognized in the MMPA as essential to the achievement of marine mammal protection. In addition, the lower court's ruling may jeopardize this nation's ongoing efforts to implement comprehensive fisheries agreements with other foreign nations, as well as preclude our issuance of permits to foreign vessels under other federal fishery management statutes. Unless Congress chooses itself to redress the court of appeals' error,[5] further review by this

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[5] As we described in our application for an extension of time within which to file this petition for a writ of certiorari and in our application for a stay pending the filing and disposition of this petition (see note 1, *supra*), Congress is actively considering amendments to the MMPA. If Congress does enact supervening legislation, further review of the court of appeals' ruling in this case may no longer be appropriate. To date, hearings have been held before both Senate and House committees to address the consequences of the decision of the court of appeals and, we are informed, amendments are being drafted for those committees' formal consideration. See *Hearings on Reauthorization of the Marine Mammal Protection Act Before the Senate Comm. on Commerce, Science and Transportation* 100th Cong., 2d Sess. (Apr. 13 and May 19, 1988); *Hearings on Reauthorization of the Marine Mammal Protection Act Before the Subcomm. on Fisheries, Wildlife Conservation and the Environment of the House Comm. on Merchant and Fisheries* 100th Cong., 2d Sess. (May 10, 1988). If this Court were to grant certiorari and Congress subsequently were to enact supervening legislation that rendered the Court's review unnecessary, the Court could then vacate the judgment of the court of appeals and remand the case to that court for reconsideration in light of the intervening legislation. See, *e.g.*, *Thomas* v. *Outboard Marine Corp.*, 479 U.S. 1002 (1986) (vacating court of appeals judgment in light of amendment of Section 104(e) of the Comprehensive Environmental

Court is needed to restore the Secretary's longstanding construction of the MMPA and reconfirm the overriding importance of judicial deference to reasonable agency construction of ambiguous statutory language.[6]

1. This Court has repeatedly described the standards for judicial review of interpretations of federal statutes by agencies charged with their administration. "If Congress has directly spoken to the precise issue in question, if the intent of Congress is clear, that is the end of the matter" (*Japan Whaling Ass'n* v. *American Cetacean Society*, 478 U.S. 221, 233 (1986); see *Amoco Production Co.* v. *Village of Gambell*, No. 85-1239 (Mar. 24, 1987), slip op. 20); *Young* v. *Community Nutrition Institute*, 476 U.S. 974, 980-981 (1986); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)). If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute * * * " (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 843; see *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985)). The agency's construction of the

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Response, Compensation, and Liability Act, 42 U.S.C. (Supp. IV) 9604(e), by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 104(m), 100 Stat. 1621-1624).

[6] Review is warranted notwithstanding the absence of a circuit conflict because a conflict is unlikely to develop; all challenges to the Secretary's decision to grant a permit under the MMPA may be brought in the United States District Court for the District of Columbia (see 16 U.S.C. 1374(d)(6)). This Court has frequenly granted certiorari to review judgments in like circumstances where the consequences of the lower court's ruling were similarly of great moment. See, *e.g.*, *Amoco Production Co.* v. *Village of Gambell*, No. 85-1239 (Mar. 24, 1987); *Japan Whaling Ass'n* v. *American Cetacean Society*, 478 U.S. 221 (1986).

statutory scheme that it is entrusted to administer need not be the only "permissible" or "reasonable" construction, or even express the most "natural[ ]" or "common" reading. See *EEOC* v. *Commercial Office Products Co.*, No. 86-1696 (May 16, 1988), slip op. 7; *Japan Whaling Ass'n* v. *American Cetacean Society*, 478 U.S. at 233; *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985). Rather it need only be "sufficiently rational * * * to preclude a court from substituting its judgment for that of [the agency]" (*Young* v. *Community Nutrition Institute*, 476 U.S. at 981 (citation omitted)).

a. As Judge Starr's dissenting opinion in this case demonstrates (App., *infra*, 17a-31a), the majority opinion transgresses this Court's settled principles of judicial review by substituting its own very different construction of the MMPA for the Secretary's longstanding, reasonable construction of ambiguous statutory language that he is responsible for administering. The court did not dispute that the Secretary's construction was longstanding.[7] Nor did the court of appeals claim that the MMPA speaks directly to the issue. Indeed, the court failed to point to a

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[7] In reliance upon his interpretation, the Secretary issued general permits under the MMPA to the Eastern Pacific purse seine tuna fleet in 1977 and 1981, the Federation of Japan Salmon Fisheries Cooperative Association in 1981, and the Pacific Coast Federation of Fishermen's Association in 1984. Each of these permits did not include particular stocks or species of marine mammals known to be encountered by the fisheries either because the stocks were known to be depleted or because their population status could not be determined due to insufficient information. In a series of unpublished opinions, the United States District Court for the District of Columbia rejected legal challenges brought against several of those permits. See *Committee for Humane Legislation* v. *Kreps*, No. 77-0564 (D.D.C. 1977); *Friends of Animals* v. *Roe*, No. 80-2870 (D.D.C. July 31, 1981); *Friends of Animals* v. *Baldrige*, No. 81-1547 (D.D.C. May 18, 1982).

single provision of the Act or anything in its legislative history that directly touches on the issue here, let alone compels rejection of the Secretary's view and acceptance of the court's contrary construction.

The court of appeals instead merely relied upon general provisions of the MMPA that encourage the Secretary to act " 'in accord[ance] with sound principles of resource protection and conservation' " (App., *infra,* 10a, quoting 16 U.S.C. 1371(a)(3)(A)), and direct him to strive to reduce " 'to insignificant levels approaching zero' " the mortality of marine mammals taken incident to fishing (App., *infra,* 12a, quoting 16 U.S.C. (& Supp. IV) 1371(a)(2)). Against the background of those provisions, the court of appeals announced that the "result" of the Secretary's interpretation of his authority was contrary to the Secretary's "duty" under the Act "because it allows—subject to the civil penalty price—illegal takings of other protected marine mammals" (App., *infra,* 13a-14a).

The court's reasoning rests, however, on a misunderstanding both of the Secretary's decision and of the structure of the MMPA. Contrary to the court of appeals' repeated assertions (App., *infra,* 16a; see *id.* at 14a), the Secretary did not "allow[ ] incidental taking of various species of protected marine mammals without first ascertaining as to each such species whether or not the population of that species was at the OSP level." Nor did the Secretary "loosen MMPA requirements in order to accommodate Federation needs" (*id.* at 15a). The Secretary permitted the incidental taking only of Dall's porpoise, a species that is at or above its OSP. The Secretary, moreover, made clear that the limited scope of the permit meant that "[t]he incidental taking of northern fur seals * * * is prohibited by the [MMPA]" and "[t]he MMPA's prohibitions will be enforced" (see 52 Fed. Reg. 19875,

19878 (1987)).[8]

Hence, the full panoply of remedies provided to the Secretary would, just as they did before the issuance of the permit for the taking of Dall's porpoise, continue to apply to the Federation's unlawful taking of any northern fur seals. Contrary to the court of appeals' intimation, the Secretary's issuance of a permit for the incidental taking of Dall's porpoise in no manner diminished the severity or availability of the MMPA's sanctions for any such unlawful takings, including the imposition of civil and criminal sanctions (see 16 U.S.C. 1375) and the possible seizure and forfeiture of cargo (see 16 U.S.C. 1376). Even more fundamentally, nothing in the text, structure, or legislative history of the MMPA suggests that Congress shares the court of appeals' belief that these express remedies are not adequate to penalize or deter commercial fishing that might incidentally take a species without a permit. In particular, the MMPA does not include the additional drastic measure that the Secretary must further deter any possible taking of a depleted (and nonpermitted) species by subjecting commercial fishermen to penalties for the taking of any marine mammal, including those that are not depleted (such as the Dall's porpoise), merely because those same activities might also harm the depleted species.[9]

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[8] For this reason, the court of appeals erred in relying (App., *infra*, 14a) on Section 1371(a)(4) of the MMPA, which provides an explicit exception from the Act's moratorium for certain incidental takings by United States citizens with negligible impact on marine mammals of a species that is not depleted. That provision has no bearing, by negative implication or otherwise, on the issue in this case because the Secretary is *not* claiming that any incidental takings of northern fur seals by the Federation would be exempt from the moratorium based on their negligible impact.

[9] We do not, of course, suggest that the Secretary lacks discretion to consider the effects of commercial fishing activities on one species in

b. For reasons further elaborated in Judge Starr's dissent, moreover, the reasonableness of the Secretary's construction cannot be gainsaid. Although Congress nowhere directly addressed the issue, there is considerable evidence in the text, structure, and legislative history of the MMPA that Congress expected the Secretary, as he did in this case, to issue permits on a species-by-species basis. Nothing in the MMPA suggests that, in doing so, he must refuse to grant permits to take members of a species that is at its OSP because other species that may possibly be affected are not at that population level.

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deciding whether to issue a permit for the incidental taking of another by those same fishing activities. We acknowledge, moreover, that the Secretary's exercise of such discretion in issuing a permit is subject to judicial review, albeit of a limited nature. The Secretary contends only that the MMPA does not *compel* his denial of a permit for the taking of one species whenever a permit cannot be issued for another species potentially affected. In this case, for instance, the Secretary carefully considered the possible effects of the Federation's commercial fishing on northern fur seals and concluded that although he could not authorize incidental takings of those mammals (based on the depleted status of the Pribilof Islands stock and the absence of information concerning the Commander Islands stock), the expected neglible impact was not sufficient to warrant the Secretary's also denying the permit for the taking of Dall's porpoise, which were not themselves a depleted species. As described by Judge Starr, the Commander Islands stock appears to have remained stable even though the Soviet Union harvests between 4000 and 5500 seals each year, and only approximately 45 northern fur seals out of a stock of 210,000 on Commander Islands are likely to be taken annually by the Federation and perhaps only 10 of those seals will be killed as a consequence (see App., *infra*, 22a n.4, 25a-26a). In addition, although there was some reason to believe that perhaps 10 of the 45 might be taken from the depleted Pribilof Islands stock, its population is approximately 800,000 and hence any adverse affect on the species, while certainly unlawful, should likewise be minimal (see *id.* at 22a n.4).

Significantly, MMPA's permit provision, Section 1374, provides for "permits which *authorize the taking* or importation of any marine mammal" (emphasis added). It does not authorize fishing operations per se. Hence, contrary to the court of appeals' assertion, the Secretary's issuance of a permit in this case does not authorize the Federation's fishing operations. It merely allows a specified number of incidental takings of one type of marine mammal (Dall's porpoise) in the event that the Federation engages in those fishing operations.

As Judge Starr recognized, moreover, "[i]n sections 1373 and 1374, the statute plainly envisions that [the Secretary] will issue permits on a species-by-species basis" (App., *infra,* 19a). Section 1373(a) (emphasis added), for example, directs the Secretary to prescribe regulations "with respect to the taking and importing of animals from *each species of marine mammal* (including regulations on the taking and importing of *individuals within population stocks*) as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of *those species and population stocks.*" See also 16 U.S.C. 1373(c), (d). Section 1374(b)(2)(A) (emphasis added) similarly provides that "[a]ny permit issued under this section shall * * * *specify* * * * *the number and kind of animals* which are authorized to be taken or imported." The legislative reports reflect the same understanding. See H.R. Conf. Rep. 92-1488, 92d Cong., 2d Sess. 22-23 (1972) ("The effect of the Senate amendment is to allow the Secretary to make a determination, species by species, that a waiver [of the Act's moratorium] is appropriate * * *. The conference substitute adopts the Senate approach."); H.R. Rep. 92-707, 92d Cong., 1st Sess. 18 (1971) ("Before any marine mammal may be taken, the appropriate Secretary must first * * * issue a permit which would allow that taking. In every case, the burden is placed upon those seeking permits to

show that the taking should be allowed and will not work to the disadvantage of the species or stock of animals involved."); S. Rep. 92-863, 92d Cong., 2d Sess. 5 (1972) ("[T]he best answer to questions on the conservation of marine mammals must be the application of scientific principles and knowledge separately for each species of marine mammals.").

Moreover, Congress has since implicitly endorsed the Secretary's reading. The Secretary's construction of the MMPA is, as we have noted, longstanding, and in 1981 the Secretary issued a permit authorizing the Federation to take Dall's porpoise, Steller sea lions, and northern fur seals, even though he recognized that other species—for which permits could not then issue under the MMPA—would be taken during the course of the Federation's salmon fishing; the Secretary explained then (as he did again in this case) that the unpermitted taking of those other species would lead to the imposition of civil liability. See 46 Fed. Reg. 27057, 27058 (1981). Congress was made aware of the permit and Congress itself extended the permit to June 1987 (see Fisheries Amendments of 1982, Pub. L. No. 97-389, § 201, 96 Stat. 1950-1951, codified at 16 U.S.C. 1034(b)). Hence, the permitting policy of the Secretary condemned by the court of appeals in this case was previously embraced and perpetuated by Congress. See 128 Cong. Rec. 30053 (1982) (remarks of Rep. Breaux) ("[T]his bill not only provides for the protection and better understanding of marine mammals and seabirds but further contributes to the maintenance of positive and cooperative United States-Japanese fishing relations.").

c. Finally, the Secretary's construction of the MMPA, unlike respondents' and the court of appeals', sensibly does not purport to draw a principled distinction, where there is none, between a commercial fishermen's incidental taking of a species beyond the number allowed to be taken

by a permit and his incidental taking of a species not covered by a permit in the first instance. Presumably, even under the court of appeals' view, the Secretary is not barred from issuing a permit for the incidental taking of a specified number (including age, size, or sex) of a species of marine mammal in the absence of assurances that those restrictions will not be violated. Indeed, were the rule otherwise, the issuance of a permit under the MMPA for any incidental taking would be virtually impossible because, as Judge Starr correctly observed (App., *infra,* 20a), "[f]ishing operators, even experienced ones, obviously are not endowed with sufficient prescience to know in advance the age, size, or sex of the mammals they will take in the course of their operations." The court of appeals would nonetheless impose an equivalent prohibition on the Secretary's authority to issue a permit for the taking of one kind of species in the absence of assurances that fishing operations will not adversely affect another species for which a permit may not issue.[10]

Under the Secretary's view, both types of transgressions are, quite reasonably, treated the same. The Act's penalty provisions apply in like fashion to a commercial fisherman's taking of a species in a quantity exceeding that authorized by a permit or his taking of a species not covered by the permit. The Secretary is not automatically barred at the outset from issuing a permit notwithstanding the possible occurrence of a subsequent violation of either type. The Secretary may instead carefully consider the extent of the risks, including the anticipated harm of either type of

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[10] The only exception to the court of appeals' blanket prohibition is an extremely narrow one, providing that "the Act may not prohibit issuance of a permit where there is only a very remote possibility that marine mammals for which an [OSP] has not been determined may be taken incidental to commercial fishing * * * " (App., *infra,* 12a).

possible violation to the species affected, and validly conclude that although a permit for the taking of either a greater number or a certain kind of marine mammal is not warranted, a permit should nonetheless issue for a lesser number or a different kind of species.[11]

2. Review is also warranted because the court of appeals' decision, if not corrected, would be likely to have a devastating effect on this nation's fishing industry as well as upon foreign nationals who seek to fish in waters subject to the jurisdiction of the United States.[12]

Most immediately, the lower court's decision has prevented the Federation from fishing in United States' waters during the 1988 salmon season (June 10th through July 31st). The decision would, as a practical matter, similarly bar the operation of major domestic fishing operations. The Pacific Coast Federations of Fishermen's Associations, for example, currently holds a general permit authorizing its members to take more than 2900 individuals of non-depleted species or stocks of marine mammals in the course of fishing activities. Consistent with the court of appeals opinion, that permit cannot be renewed upon its expiration on December 31, 1988, be-

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[11] Of course, the Secretary may determine that the risk of transgression either in terms of the kind or quantity of marine mammals that might be taken is so great that no permit should issue at all (see note 9, *supra*), or should be issued, but based upon certain conditions deemed appropriate by the Secretary (see 16 U.S.C. 1374(b)(2) (D)). In this case, however, the Secretary determined that the associated risks were minimal (see 52 Fed. Reg. 19878 (1987)).

[12] Because of these consequences, both House and Senate committees have held hearings to consider proposals for corrective legislation that would, in effect, overturn the court of appeals' ruling in this case. It is our understanding that those committees are now in the early stages of drafting legislative proposals for possible congressional consideration and enactment (see note 5, *supra*).

cause the covered fishing activities incidentally take small numbers of northern fur seals and northern (Steller) sea lions, which are two species of marine mammals that are thought to be depleted. Hence, the membership of the Pacific Coast Federations of Fishermen's Associations will thenceforth have to forgo fishing altogether or be subject to civil liability for penalties of $10,000 for each marine mammal of *any* species that is taken (see 16 U.S.C. 1375(a)(1)), even though the vast majority of these penalties would be imposed for taking individual mammals from species or stocks, such as the California sea lion, that are abundant. Such a harsh result cannot be squared with the legislative compromise struck by Congress in the MMPA, requiring the Secretary to "give full consideration" to "the conservation, development, and utilization of fishery resources" in regulatory actions (16 U.S.C. 1373(b)(4)).

The court of appeals' misreading of the MMPA likewise merits review because, ironically, it may pose the greater threat to the protection of marine mammals by undermining international cooperative efforts that Congress deemed essential for the protection of those animals. The Department of State has indicated that Japan may ultimately respond to the decision below by seeking to reopen the 775,000-square-mile area lying outside United States' waters that currently is closed to its fishermen pursuant to an international agreement (see note 2, *supra*), and where stocks of migrating United States and Canadian salmon are found. If Japan does, Japanese interception of salmon of United States origin could dramatically increase, leading to severe losses for domestic salmon fishermen. It would also likely lead to increased mortality for marine mammals because Japan would not, of course, be subject to the MMPA outside United States waters and because the Japanese fleet almost certainly would exclude the

United States scientists who currently monitor incidental takes of marine mammals from Japanese vessels in United States waters. It would likewise diminish the incentive for the Japanese fleet to adopt new fishing gear or techniques to reduce porpoise mortality (see 16 U.S.C. 1034(a)).

Finally, the question presented is important because the court of appeals' decision may have far-reaching effects beyond those on the Japanese salmon fishery at issue in this case and on similarly situated domestic fishermen. The Department of Commerce informs us that the decision may compromise ongoing efforts to implement a comprehensive fisheries agreement with the Soviet Union. The court's decision may also preclude the award of permits to foreign fishermen for operations in East Coast mackerel fisheries under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1601 *et seq.*, because that Act requires foreign fishermen to possess permits under other federal fishery laws, including the MMPA (see 16 U.S.C. 1853(a)(1)(C)).

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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SEPTEMBER 1988

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5239

KOKECHIK FISHERMEN'S ASSOCIATION, ET AL.

v.

SECRETARY OF COMMERCE, ET AL.

FEDERATION OF JAPAN SALMON FISHERIES COOPERATIVE ASSOCIATION, APPELLANT

AND CONSOLIDATED CASE Nos. 87-5240, 87-5241, 87-5242, 87-5243, 87-5248 AND 87-5249

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
(CIVIL ACTION Nos. 87-01440, 87-01472 AND 87-01351)

Argued November 3, 1987
Decided February 16, 1988

Before: *RUTH B. GINSBURG and STARR, Circuit Judges, and GESELL**, *District Judge.*

Opinion for the Court filed by District Judge GESELL.

Dissenting opinion filed by *Circuit Judge* STARR.

GESELL, *District Judge*: This case requires us to examine an aspect of this nation's announced policy to protect, in waters under its jurisdiction, marine mammal populations that are in danger of depletion or extinction.

Following formal rulemaking proceedings, the Secretary of Commerce issued a regulation[1] pursuant to the Marine Mammal Protection Act of 1972 ("MMPA"), 16 U.S.C. §§ 1361-1407 (1982 & Supp. III 1985), authorizing a group of Japanese commercial fishermen known as the Federation of Japan Salmon Fisheries Cooperative Association ("Federation") to take a fixed number of Dall's

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] Regulations Governing the Taking and Importing of Marine Mammals, 52 Fed. Reg. 19,874 (1987).

porpoise incidental to commercial fishing for salmon in U.S. conservation waters. The permit application was opposed at the administrative level by environmentalists, the Center for Environmental Education, *et al.* ("CEE") and by a group of Alaskan commercial fishermen, Kokechik Fishermen's Association, *et al.* ("Kokechik"). As finally authorized on May 22, 1987 after several amendments, the permit failed to meet objections advanced during the rulemaking process by Kokechik and CEE, on one side, and the Federation on the other side.

Shortly after the Secretary's final decision, the Federation, Kokechik and CEE filed petitions for review of the permit in the U.S. District Court for the District of Columbia, as authorized by the statute, 16 U.S.C. § 1374(d)(6). On June 10, 1987, the three cases were consolidated by the District Court and a hearing held on the motions for preliminary injunction filed by the three parties. After careful consideration, the District Court granted the motions of petitioners Kokechik and CEE on June 15, 1987, and thus preliminarily enjoined the Secretary of Commerce from issuing a permit to the Federation; the Federation's motion was thereupon dismissed as moot. *Kokechik Fisherman's Ass'n. et al. v. Malcolm Baldridge, et al.*, __ F. Supp. __ (D.D.C. 1987). Appellants Federation and Secretary of Commerce then filed a notice of appeal in this Court on June 25, 1987.

Because a question of pure statutory interpretation controls our review of the District Court's order, and its final resolution is essential, we turn immediately to this decisive issue. *See NRDC v. Morton,* 458 F.2d 827, 832 (D.C. Cir. 1972). Perceiving the issue as the District Court preliminarily suggested it should be decided, we affirm and remand to the District Court only for such further proceedings consistent with this decision as may be required.

BACKGROUND

In 1952, the United States, Japan and Canada signed the International Convention for the High Seas Fisheries of the North Pacific Ocean ("INPFC"). 4 U.S.T. 380, T.I.A.S. No. 2786. Under this treaty, Japan agreed to refrain from fishing for salmon in certain areas of the North Pacific Ocean and in the Bering Sea. In 1978, the INPFC was renegotiated to bring the treat in conformity with the recent adoption by the United States of a 200 mile Fisheries Conservation Zone, now known as the Exclusive Enterprise Zone ("EEZ"). 30 U.S.T. 1095, T.I.A.S. No. 9242. The protocol amending the treaty permitted the Japanese to fish for salmon inside the U.S. EEZ. *Id.* The North Pacific Fisheries Act of 1954 ("NPFA"), implementing the INPFC, was also amended in 1978 and exempted Japanese commercial salmon fishing from the strictures of the MMPA until June 9, 1981. 16 U.S.C. § 1034(b) (1976 & Supp. II 1978). The NPFA further provided that after June 9, 1981 the restrictions of the MMPA would apply with full force and effect to Japanese salmon fishing within the EEZ. *Id.* § 1034(c).

In 1981, the National Oceanic and Atmospheric Administration ("NOAA"), acting pursuant to section 1374 of the MMPA, issued the Federation a three year general permit allowing its members an annual take of 5,500 Dall's porpoise, 450 northern fur seas, and 25 northern sea lions incidental to their commercial salmon fishing. Takings of Marine Mammals Incidental to Commercial Fishing Operations, 46 Fed. Reg. 27,056 (1981). Congress then extended this permit in 1982 by amendments to the North Pacific Fisheries Act on the condition that further research be performed examining ways to reduce or avoid incidental takings of marine mammals during salmon gillnet fishing. 16 U.S.C. § 1034(b) (1982). The permit was sched-

uled to expire on June 9, 1987 and without either Congressional extension of the permit or the issuance of a new general permit, the Federation's commercial salmon fishing within the U.S. EEZ would effectively cease at that time.

On July 21, 1986, the National Marine Fisheries Service ("NMFS"), a division of NOAA, received an application from the Federation for a five year general permit under the MMPA which essentially sought an extension of the previous permit's terms through June 9, 1992. As required by the MMPA, NMFS NOAA published in the *Federal Register* a notice of receipt of the application, the proposed regulation based on the application and the scheduling of formal rulemaking hearings, along with the procedures to be used and issues to be examined at the hearings. Regulations Governing the Taking and Importing of Marine Mammals, 51 Fed. Reg. 29,674 (1986). In addition, included in the notice were statements required under section 103(d) of the MMPA concerning the status of each marine mammal stock affected and the effects of any permitted taking on its optimum sustainable population ("OSP").[2] 16 U.S.C. § 1373(d). A Draft Environmental Impact Statement was also issued shortly thereafter by the Environmental Protection Agency. No statements were published relating to northern sea lions because only one had been reported taken since the general permit was issued in 1981 and the NMFS considered the probability of other incidental takings too remote to warrant its concern. In addition, it was noted that northern fur seas from the Pribilof Islands could not be included in the proposed

[2] The term "optimum sustainable population", as defined in 50 C.F.R. § 216.3 (1986), means "a population size which falls within a range from the population level of a given species or stock which is the largest supportable within the ecosystem to the population level that results in maximum net productivity."

permit regulation because of a separate agency action to list the stock as depleted, thereby precluding issuance of a taking permit under the MMPA.[3] Thus, the proposed regulation dealt solely with the incidental taking of Dall's porpoise.[4]

On December 1-7, 1986, a formal rulemaking hearing on the permit request and proposed regulation was held before an Administrative Law Judge ("ALJ") of the United States Department of Commerce. After careful consideration of a voluminous record, the ALJ recommended issuance of a five year permit to the Federation allowing the incidental taking of 1,750 Dall's porpoise during 1987 with a 5% yearly reduction over the following four years, and 45 northern fur seals annually.[5] The decision to recommend the inclusion of northern fur seals was arrived at during the course of rulemaking when it was learned that the Federation was seeking permission to take northern fur seals from the Commander Island stock, not from the Pribilof Island stock which was thought to be depleted.[6] The ALJ also noted that sea lions, harbor por-

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[3] The NMFS proposed to designate the Pribilof Island population of North Pacific fur seals as depleted under the MMPA on Decmeber 22, 1986. North Pacific Fur Seal—Pribilof Island Population; Designation as Depleted, 51 Fed. Reg. 47,156 (1986).

[4] The initial proposed rule would have permitted the annual incidental taking of 5,500 Dall's porpoise. 51 Fed. Reg. 29,674, 29,675 (1986).

[5] Subsequent to the ALJ's recommendations, the NMFS published a notice of amendment to the proposed rule which would have permitted the Federation to take annually up to 450 northern fur seals incidental to commercial fishing. Regulations Governing the Taking and Importing of Marine Mammals, 52 Fed. Reg. 2,566 (1987).

[6] At the time the application was received and the initial proposed regulation noticed, the NMFS believed that the permit sought permission to take northern fur seals from the Pribilof Island stock, not from the Commander Island stock. 51 Fed. Reg. at 29,676.

poise, Pacific white-sided dolphin, northern right whale dolphin, and killer whales are incidentally, although infrequently, taken during salmon gillnet fishing and that the Federation had applied in its permit for the taking of northern sea lions. The ALJ concluded that since there was virtually no scientific data on the record concerning these species, either because the Federation had not applied for such takings in its permit or the NMFS had not included them in the Federal Register notice,[7] the Federation was prohibited from taking these species.[8] In addition, the ALJ made findings and recommendations relating to the terms and conditions attaching to the permit and further research needs.

Pursuant to rulemaking procedures, the Secretary then reviewed the record developed during the formal hearings, the ALJ's recommended decision, the exceptions filed thereto, and the Final Environmental Impact Statement, and issued a final decision. The final rule provided for a general permit to be issued under the MMPA to the Federation allowing "an aggregate taking during the three year permit period of no more than 789 Dall's porpoise in the Bering Sea and 5,250 in the North Pacific Ocean, of which no more than 2,494 may be taken from the North Pacific Ocean in any single calendar year." Regulations

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[7] Although the Federation requested a taking quota for northern sea lions, the original proposed rule did not include this species because the NMFS believed that the probability of incidental taking of northern sea lions was too remote to warrant consideration. *Id.*

[8] The Secretary in his 1981 final decision authorizing the issuance of a permit to the Federation ruled that "[t]he permit and regulations allow no takings of harbor porpoises, Pacific white sided dolphin or killer whale. Takings of these marine mammals are in violation of and subject to prosecution under the MPA." 46 Fed. Reg. 27,056, 27,058 (1981). That permit, however, did allow for the annual taking of 25 northern sea lions.

Governing the Taking and Importing of Marine Mammals, 52 Fed. Reg. 19,874 (1987). With regard to the northern fur seals, the Secretary determined that an incidental take permit could not be issued under the MMPA because insufficient information existed on the record to ascertain whether the Commander Island population was at the minimum level of its optimum sustainable population. *Id.* at 19,875. Further, he ruled that the "incidental taking of northern fur seals, like the taking of northern (Steller) sea lions, harbor porpoise, Pacific white-sided dolphin, northern right whale dolphin, and killer whales is prohibited by the Marine Mammal Protection Act." *Id.* at 19,878.[9]

ANALYSIS

The Federation's commercial salmon fishing in the U.S. EEZ is conducted with the use of gillnets. Gillnet fishing involves setting out nylon nets approximately nine miles long and 26 feet deep at dusk using small fleets of motor boats. The nets drift freely near the surface where salmon and marine mamals, primarily Dall's porpoise, feed during

[9] The Secretary believed that the Federation was trapped in unfortunate circumstances by the strictures of the MMPA. After reviewing the record, he felt that only a negligible number of mammals, in terms of impact on the species and stocks, not covered by the permit would be incidentally taken and that some of these mammal stocks did not "require the absolute protection provided by the MMPA." 52 Fed. Reg. at 19,878. Therefore, the Secretary felt that civil penalties in these circumstances served no useful purpose and intended to "seek amendment of the MMPA to permit incidental, but not intentional, takings of small numbers of marine mammals, by vessels engaged in commercial fishing, if such takings will have a negligible impact on the species and stocks." *Id.* This type of exemption for incidental, but not intentional, takings having a negligible impact on the species involved is currently limited to citizens of the United States. *See* 16 U.S.C. § 1371(a)(4)(A).

the night. These fish and mammals become ensnared in the drifting nets. The next morning motor boats retrieve the nets and haul in whatever catch has been ensnared in the nets.

As is readily apparent, this method of fishing does not permit discrimination between which species of fish and mammals will be ensnared and which will not. Consequently, although the Federation actively seeks to catch only salmon, marine mammals protected by the MMPA end up as unintentional victims of salmon gillnet fishing because of the nature of the fishing gear and techniques used. This result is absolutely prohibited by the MMPA unless, pursuant to the requirements of the Act, the Secretary of Commerce specifically grants permission for the taking of marine mammals incidental to commercial fishing.[10] 16 U.S.C. § 1371(a)(2).

The permit at issue here grants the Federation permission to take a specified quota of Dall's porpoise incidental to commercial gillnet salmon fishing. No other marine mammal species are included within the permit. Although Dall's porpoise is the protected marine mammal primarily affected by the Federation's fishing, it is foreseeable that takes of northern fur seals, northern sea lions, harbor porpoises, Pacific white-sided dolphins and killer whales will occur. Since the taking of any of these other marine mammals without a permit is absolutely prohibited by the MMPA, the legitimacy of the permit issued here comes under scrutiny. The MMPA must be analyzed to determine whether the Secretary of Commerce may legally issue a permit allowing incidental taking of one protected

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[10] The Secretary defines the term "incidental catch" to include the taking of a marine mammal "as a consequence of the steps used to secure the fish in connection with commercial fishing operations" 50 C.F.R. § 216.3 (1986).

marine mammal species knowing that other protected marine mammal species will be taken as well.

Congress, by enacting the MMPA, put into effect a moratorium on the taking of marine mammals. The term "moratorium" is defined by the Act to mean "a *complete cessation* of the taking of marine mammals. . . ." 16 U.S.C. § 1362(7) (emphasis added).[11] Since June 9, 1981, this moratorium has applied to Japanese commercial fishing in the U.S. EEZ. Section 1377 of the MMPA requires the Secretary of Commerce to enforce the provisions of the Act and implementing regulations promulgated thereunder.

Under a limited exception to this moratorium, the taking of marine mammals incidental to commercial fishing operations may be allowed. 16 U.S.C. § 1371(a)(2). Before such a permissible taking can occur under this exception, two statutory requirements must be met; the taking must be authorized by regulations promulgated through formal rulemaking proceedings and a permit issued by the Secretary of Commerce; the taking must meet the requirements of the MMPA and be consistent with the primary goal of protecting marine mammals. *See id.*

Under the MMPA, before a permit authorizing a taking may be issued, the Secretary "must be assured that the taking . . . is in accordance with sound principles of resource protection and conservation as provided in the purposes and policies of this chapter. . . ." 16 U.S.C. § 1371(a)(3)(A). The guiding principles of resource protection and conservation are set out in 16 U.S.C. §§ 1361(2) and 1361(6). Section 1361(2) provides:

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[11] In turn, the Act defines "take" to mean "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(12). The Secretary further interprets the term "harass" to include "the restraint or detention of a marine mammal, no matter how temporary." 50 C.F.R. § 216.3 (1986).

> [Marine mammal] species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. . . .

Section 1361(6) reads in relevant part as follows:

> [I]t is the sense of Congress that [marine mammals] should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.

Thus, it is clear that "[t]he Act was to be administered for the benefit of the protected species rather than for the benefit of the protected species rather than for the benefit of commercial exploitation." *Committee for Humane Legislation, Inc. v. Richardson,* 540 F.2d 1141, 1148 (D.C. Cir. 1976).

Consonant with these principles, the MMPA provides a scheme to determine the *number* and *kind* of marine mammals which can be taken incidental to commercial fishing operations. Under this scheme, the Secretary is obligated to determine that the permit applicant has carried its burden of providing that the taking sought does not disadvantage the species involved and is consistent with the policies and purposes of the Act. The Secretary, thus, must first determine that the requested taking will not be to the disadvantage of the affected species and population

stocks. 16 U.S.C. § 1373(a). Pursuant to this determination and in conjunction with the formal rulemaking proceedings, the Secretary must publish statements on population levels and the expected impact of the proposed regulations on the optimum sustainable population of the affected marine mammal species. 16 U.S.C. § 1373(d). Any decision the Secretary makes must be consistent with the MMPA "immediate goal" that

> the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishery operations be reduced to insignificant levels approaching zero mortality and serious injury rate. . . .

16 U.S.C. § 1371(a)(2).

While the Act may not prohibit issuance of a permit where there is only a very remote possibility that marine mammals for which an optimum sustainable population has not been determined may be taken incidental to commercial fishing, such a situation is clearly not the case here. In its original permit application the Federation requested that 450 fur seals be allowed to be taken annually incidental to commercial salmon fishing in the U.S. EEZ.[12] Although there were indications the taking might be less, it is readily apparent that the taking of these marine mammals is not merely a remote possibility but a certainty.[13]

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[12] NMFS's regulations require that all applications for a general permit to take marine mammals incidental to commercial fishing operations include:

> A statement identifying the marine mammals and numbers of marine mammals which are *expected* to be taken under the general permit.

50 C.F.R. § 216.24 (emphasis added).

[13] When he granted the permit to the Federation the Secretary was informed and knew that species of marine mammals other than Dall's

In his final decision, the Secretary concluded that it was not possible to make the required finding that the northern fur seal population from the Commander Island stock is within its optimum sustainable population level. The Secretary found the evidence unclear and that a "significant dispute" existed as to whether it was above the minimum level of its optimum sustainable population. It could not be determined, therefore, that this protected stock would not be disadvantaged by takings incidental to the Federation's fishing operations in the U.S. EEZ. As to the Pribilof Island population, the Secretary found it was depleted. Thus, in neither case could findings which are an absolute requirement for the issuance of a permit and waiver of the MMPA be made.[14] Yet the Secretary, despite his inability to determine whether and to what extent northern fur seals would be disadvantaged by the Federation's fishing operations, issued the permit taking the position that as long as it did not authorize the taking of northern fur seals he had complied with the MMPA. The result was, in effect, that the permit allowed the Federation to take protected marine mammals for a price—the civil penalties imposed for such takings.

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porpoise, a species at the OSP level, would inevitably be taken incidental to the Federation's salmon fishing operations. These included northern fur seals from the Pribilof Island stock, a depleted species protected under the MMPA, as well as other species as to which no OSP finding one way or the other had been made—northern fur seals from the Commander Island stock, harbor porpoise, northern right whole dolphin, Pacific white-sided dolphin, and other dolphin, as well as various sea lions.

[14] It is necessary to know the OSP in order to determine whether or not an activity will "disadvantage" the marine mammals involved. Therefore, Congress required the Secretary to act only on the basis of the very knowledge which he admits is unknown: the effect of any proposed taking on optimum sustainable population levels.

This is a result that the MMPA does not countenance. The MMPA effects a moratorium on the taking of marine mammals. Congress decided to undertake this decisive action because it was greatly concerned about the maintenance of healthy populations of all species of marine mammals within the ecosystems they inhabit. Exceptions to this moratorium clearly evidence a concern with the relationship between the activity engaged in and its effect on marine mammals and their ecosystem. It is the duty of the Secretary to take a systemic view of an activity's effect on marine mammals. A view that the permit process functions merely to determine which takes will be exempted from civil penalties is inconsistent with this duty because it allows—subject to the civil penalty price—illegal takings of other protected marine mammals.

The Secretary has no authority, by regulation or any other action, to issue a permit that allows conduct prohibited by that Act. Nonetheless, the Secretary chose to disregard these incidental takings as "negligible," an undefined and ambiguous standard at best. The MMPA, however, does not provide for a "negligible impact" exception to its permitting requirements where incidental takings are not merely a remote possibility but a certainty.

As enacted, section 1371(a)(4) creates a narrow exception for incidental, but not intentional, takings having a negligible impact on the species involved "by citizens of the United States while engaging in commercial fishing operations, ..." The Secretary is not authorized to extend this flexibility to the Japanese nor is he authorized to create a new undefined statutory exception under the heading of "negligible," which clearly has the effect of avoiding the strictures of the MMPA and congressional intent. Practical considerations or unavailability of information is no excuse. If the Secretary believes the Act needs

amendment, then it is Congress he must address. The horse must stay ahead of the cart.

Furthermore, Congress has provided one statutory relaxation of the MMPA's otherwise strict moratorium on takings except as authorized in section 1371(a). Section 1371(a)(2) was amended in 1981 to read:

> In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero serious injury and mortality rate: provided that his goal shall be satisfied in the case of the incidental taking of marine mammals in the course of seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable.

No similar language was included in the 1982 amendment of section 1034, which reauthorized the Federation permit for 1984-87. It thus appears that Congress did not intend to loosen MMPA requirements in order to accommodate Federation needs, as it did for the tuna industry.

The MMPA does not allow for a Solomonic balancing of the animals' and fisheries' interests such as the Secretary attempted.[15] The interest in maintaining healthy populations of marine mammals comes first and the Secretary cannot ignore the fur seals. He can include the northern fur seals in the permit only if he makes the requisite find-

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[15] In *Committee for Humane Legislation, Inc. v. Richardson,* this Court stated that the "[b]alancing of interests . . . is entirely a legislative decision, dictated at present by the terms of the Act." 540 F.2d at 1151 n.39. Thus, the Secretary's concern for potential harm to Japanese commercial fishing of our system of international treaties should be addressed to Congress.

ings. Lacking such findings the permit cannot issue. Moreover, he may not allow the Federation merely to pay a price for taking protected marine mammals; and he must face up to the taking of other marine mammals the record shows will also inevitably occur if gillnet fishing is permitted.

CONCLUSION

Thus, we hold that the permit, as granted to the Federation, is contrary to the requirements of the MMPA in that it allowed incidental taking of various species of protected marine mammals without first ascertaining as to each such species whether or not the population of that species was at the OSP level. If it is appropriate to grant foreign commercial fishermen some leeway to take marine mammals incidentally in carrying out their commercial fishing operations for salmon, it is for the Congress, not the Secretary to decide. Past administrative practice that is inconsistent with the purpose of an act of Congress cannot provide an exception and the moratorium must still be fully upheld in this situation. *See FEC v. Democratic Senatorial Campaign Committee,* 454 U.S. 27, 32 (1981).

Affirmed and remanded for further proceedings consistent with this decision.

STARR: *Circuit Judge, dissenting*: This case arises out of the faraway, frigid waters of the Bering Sea. There, fish abound in waters where interests of the United States, the Soviet Union, and Japan coincide and, at times, conflict. Not only are the great commercial fishing powers present, with motherships and fleets of catcher boats plying their trade; also present are creatures, some based on land, some at sea, known as marine mammals. Marine mammals, like mother ships and catcher boats, fish for their living as well. And in the robust waters of the North country, commercial fishing nets and marine mammals at times, indeed inevitably, come into contact. The issue before us concerns the welfare of marine mammals caught up, quite literally, in the nets of ships of commerce and trade.

Notwithstanding the unusual setting of this case, the question presented to us is the workaday one of statutory construction. In rejecting the common-sense reading of the statute adopted by the agency charged with administering it, the court reaches a result that, in my judgment, Congress never contemplated. In my view, today's decision is unsupported by the text, structure, or legislative history of the statute. I therefore respectfully dissent.

I

Under now-familiar principles, the task before us in construing a statute administered by an agency of the Executive Branch is clear. First, if Congress has addressed the precise issue in question, and the intent of Congress is clear, it is the judiciary's duty to give effect to that Congressional determination. *See NLRB v. United Food and Commercial Workers Union,* 108 S. Ct. 413, 421 (1987); *Japan Whaling Ass'n v. American Cetacean Society,* 106 S. Ct. 2860, 2867 (1986); *Chevron, U.S.A. v. NRDC,* 467

U.S. 837, 842-43 (1984). If, on the other hand, the statute is silent or ambiguous with respect to the inquiry at issue, we are obliged under settled principles of law to defer to the agency's construction, if reasonable, of that statute. *United Food,* 108 S. Ct. at 421; *Japan Whaling Ass'n,* 106 S. Ct. at 2868; *Chevron,* 467 U.S. at 844.

It is abundantly clear that Congress did not speak in so many words to the precise issue that the court decides today: whether the National Oceanic and Atmospheric Administration ("NOAA"), which is charged with administering the Marine Mammal Protection Act, 16 U.S.C. § 1361 (1982) *et seq.* ("MMPA"), is prevented from issuing a permit for one species because other species, for which a permit cannot lawfully issue, would inevitably be taken. Although the text of the statute does not provide a definitive answer to this question, the overall statutory scheme contemplates precisely the construction given by NOAA. In the MMPA, Congress created a species-based permit system that would enable fishing operations to carry on. The court's critical interpretive error, I believe, lies in its failure to give meaningful content to the species-based permit system established by Congress as an essential part of the legislative compromise embodied in the MMPA, a compromise evidenced by, on the one hand, the moratorium on the taking of marine mammals and, on the other hand, the system of permits for taking marine mammals in the course of fishing operations. By virtue of its interpretive approach, the court ultimately embraces a result that is so counter-intuitive that one must in conscience wonder whether a reasonable Congress would have desired the odd outcome of calling a complete halt to important fishing operations with clear foreign policy implications.[1]

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[1] The Federation of Japan Salmon Fisheries Cooperative Association ("Federation") estimates that its fishing operations involve

A

In the same section of the MMPA enacting the moratorium on takings, section 1371(a)(2) makes the permit system an integral part of the overall statutory scheme:

> Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefor under section 1374 of this title subject to regulations prescribed by the Secretary in accordance with section 1373 of this title.

This language contemplates the incidental taking of marine mammals as long as certain statutory requirements are met. The noncasual reader will have noticed that section 1371(a)(2) makes reference to two other sections of the MMPA: section 1373, which charges NOAA with developing regulations governing the taking of marine mammals; and section 1374, which confers authority on NOAA to issue permits in accordance with certain statutory guidelines.

In sections 1373 and 1374, the statute plainly envisions that NOAA will issue permits on a species-by-species basis. For example, section 1373(a) directs NOAA to "prescribe . . . regulations with respect to the taking . . . of animals from each species of marine mammal. . . ." Section 1374(b)(2)(A) provides that "[a]ny permit issued under this section shall specify the number and kind of animals which are authorized to be taken or imported."

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employment of approximately 51,861 people, including those engaged in distribution and processing associated with the industry. Statement of Shintaro Enomoto, Appendix of Appellant ("Appellant App.") at 349. The Federation calculated that it would have incurred losses in preparatory expenditures amounting to over $40 million had the District Court not stayed its temporary injunction for 20 days, thereby allowing fishing operations in the 1987 season. Affidavit of Shintaro Enomoto, Appellant App. at 59.

Finally, section 1373(c) authorizes NOAA to promulgate regulations that restrict the age, size, or sex of the marine mammals for which a permit may issue. Fishing operators, even experienced ones, obviously are not endowed with sufficient prescience to know in advance the age, size, or sex of the mammals they will take in the course of their operations: as a result, a moment's reflection suggests that *this provision necessarily means that operators will take some marine mammals even though a permit for that taking has not issued.* This is, of course, precisely how NOAA has interpreted the measure.[2]

The record thus suggests that Congress contemplated a situation in which NOAA would lawfully issue a permit for one species while at the same time denying a permit for another species that would inevitably be taken in the same fishing activity because the applicant had failed to jump through one of the MMPA-erected hoops, *see supra* note 2. In fact, in issuing its first General Permit to the Federation of Japan Salmon Fisheries Cooperative Association ("Federation"), NOAA observed that "the Japanese sal-

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[2] These provisions impose upon NOAA an obligation to make specific, affirmative findings with respect to *each* species for which a permit is issued before NOAA can issue a permit for the taking of that species. NOAA must ascertain the "existing levels of the species and population stocks" of the mammals to be taken, the optimum sustainable population ("OSP") of those mammals, and the impact of the takings of the OSP on the species, § 1373(d); *see also Committee for Humane Legislation v. Richardson,* 540 F.2d 1141, 1149-50 (D.C. Cir. 1976). In making these assessments, NOAA must conduct hearings on the record, § 1373(d), and report to Congress annually on "the current status of all marine mammal species and population stocks" covered by the MMPA. § 1373(f). And, as an overriding concern in the permit structure, NOAA must assure that any permitted takings "not be to the disadvantaged of those species." § 1373(a). Only if NOAA has jumped through each of these statutory hoops, among others, can it issue a permit for the taking of a particular species.

mon fishery expects to take incidentally on a yearly basis in the U.S. [Exclusive Economic Zone ("EEZ")]" 5,500 Dall porpoise, 50 harbor porpoise, 25 Pacific white-sided dolphins, 25 killer whales, 25 Steller sea lions, and 450 northern fur seals. 46 Fed. Reg. 27057 (1981), Appellant App. at 402. *Even though the agency recognized that all these various species of mammals would be taken in the Federation's operations,*[3] *NOAA issued permits for only three species*: Dall porpoise, Steller sea lions, and northern fur seals. NOAA explained that it had not yet been able to conduct the formal review necessary for a permit to issue under the Act for the other species, and that the "permit covering harbor porpoise, Pacific white-sided dolphin and killer whale remains unprocessed." *Id.* Instead, NOAA made clear, "[t]he permit and accompanying regulations allow no takings of harbor porpoise, Pacific white-sided dolphin, or killer whale. Takings of these marine mammals are in violation of and subject to prosecution under the MMPA." *Id.* at 27058, Appellant App. at 403. It is *this* permit, which assumed that other, nonpermitted mammals would also be taken (notwithstanding the moratorium), that Congress itself extended in amending the North Pacific Fisheries Act of 1954, 16 U.S.C. § 1021 *et seq.* ("NPFA"). History thus teaches us that both Congress and the agency charged with administering the MMPA contemplated that permits would be issued in circumstances in which nonpermitted takings would inevitably occur.[4]

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[3] To borrow the language of the court, the agency knew this to be "not merely a remote possibility but a certainty." Maj. op. at 12; *see also* Maj. op. at 12 n.13.

[4] Appellees place particular emphasis on the nonpermitted takings of fur seals. There is some controversy among the parties about the number of fur seals likely to be taken in the Japanese salmon fishery. Despite some hints in the court's opinion to the contrary, Maj. op. at

5-6, the issue was fully joined in administrative proceedings below. Two different population stocks are at issue, namely, fur seals from the Pribilof Islands in the eastern Bering Sea off Alaska and fur seals from the Commander Islands in the Soviet Union.

Appellants do not appear to contest NOAA's determination that the Pribilof fur seals are legally depleted. *See* Reply Brief of Appellant Federation of Japan Salmon Fisheries Cooperative Association at 19 n.24; Reply Brief of Federal Appellants at 4-5. The ALJ found that the Pribilof population had declined "from 1.8 million or thereabouts to something less than half of that over a period of ten or fifteen years." Recommended Decision of Hugh J. Dolan, Administrative Law Judge ("ALJ Decision") at 33, Appellant App. at 285. According to the ALJ, the population continues to decline at a rate of roughly 6.5% per year. *Id.* NOAA's proposed rule designating Pribilof fur seals as depleted estimated that their population had declined from 1.3 million in the late 1970's to 871,000 in 1983, a decline of one-third in less than a decade. 51 Fed. Reg. 47158 (1986), Appellant App. at 315. NOAA also estimated current [1986] population at 800,000. *Id.* An important cause of the decline in Pribilof fur seal population was found to be entanglement in *discarded* nets and debris, rather than set nets used in actual operations. *Id.* at 47159, Appellant App. at 316.

In contrast to the stock of Pribilof fur seals, the ALJ found the stock of Commander fur seals to be stable, if not increasing, and estimated the current population at 210,000. ALJ Decision at 33, Appellant App. at 285. The ALJ also noted that the stock sustains a harvest by the Soviet Union of about 4,000 to 5,500 fur seals annually. *Id.* at 34, Appellant App. at 286.

The court implies that as many as 450 fur seals might be taken in the Federation's fishing operations. *See* Maj. Op. at 12 n.12. The agency's determination, however, was squarely to the contrary. The Federation estimated that the take of all fur seals would amount to an average of 45 per year. The ALJ accepted this figure and found it *de minimis*. *Id.* The Environmental Impact Statement ("EIS") also adopted this 45/year figure. EIS at 66, Appellant App. at 217.

Of these 45 fur seals likely to be taken annually, the ALJ calculated, as a matter of mathematical probability, that 10 would be taken from the Pribilof Island stock and that one out of those 10 would die. ALJ Decision at 35, Appellant App. at 287. *There was, however, no direct evidence of even a single fur seal from the Pribilof stock ever having been taken.* The ALJ's estimates were based on mathematical probabilities only.

Indeed, the legislative history of the statute buttresses the view that Congress considered and rejected a blanket prohibition on marine mammal takings in favor of a system of regulated takings within a permit structure. In debates on the Senate floor, Senator Ernest Hollings, in his capacity as Chairman of the Subcommittee on Ocean and Atmosphere of the Committee on Commerce and manager of the bill on the Senate floor, rejected the call for an "immediate ban on the taking of any and all marine mammals." 118 Cong. Rec. 25253 (July 25, 1972). Subsequently, in oversight hearings two years after the Act's passage, Congressman Dingell reaffirmed that "[i]t was not our intention that commercial fishing would be brought to a halt." Hearings on Oversight of the Marine Mammal Protection Act of 1972 before the Subcommittee on Fisheries and Wildlife Conservation and the Environment, 93d Cong., 2d Sess., ser. no. 93-24, at 22 (1974).

In light of this history, it is evident that the court has today created another hoop, nowhere to be found in the statute, through which NOAA must jump before it can issue a permit for the taking of marine mammals.[5] But this hoop is singular in its difficulty. The court's construction of the MMPA effectively requires that *no* permit for *any* species issue until a permit for *all* mammals likely to be entangled can lawfully issue. This far-reaching construction fails, I believe, to account for NOAA's obligation under the Act to fashion a workable permit system on a species-by-species basis.

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[5] Although the MMPA provides for a full panoply of remedies, including vessel seizure and criminal sanctions, §§ 1374-1375, the statute does not provide for the remarkable remedy that the District Court has chosen to craft here and that the court today affirms—that is, an injunction against issuing a permit for the taking of one species when another, for which no permit may lawfully issue, will inevitably be taken.

B

Two other factors support the view that Congress intended to achieve protection of marine mammals other than by a blanket prohibition inexorably halting all fishing operations. First, the MMPA clearly envisioned a gradual reduction in takings through new techniques and enforcement mechanisms, *see e.g.*, § 1380 (research grants), § 1381 (fishing gear development), § 1378 (international program), while permitting underlying fishing activity to continue. Second, the Federation is allowed to fish in waters subject to U.S. jurisdiction (the U.S. EEZ) pursuant to U.S. treaty obligations embodied in the International Convention for the High Seas Fisheries of the North Pacific Ocean ("INPFC"), May 9, 1952, 4 U.S.T. 380, T.I.A.S. No. 2786. The treaty, as amended in 1978, 30 U.S.T. 1095, T.I.A.S. No. 9242, provides for an area of approximately 775,000 square miles outside the U.S. EEZ in which North American-origin salmon and marine mammals are protected. The treaty allows, in return, Japanese salmon fishing operations within an area of approximately 80,000 square miles inside the U.S. EEZ where the Japanese catch is primarily salmon of Asian origin. *See* Brief for the Federal Appellants at 4. Although the Federation's fishing activity within the U.S. EEZ is subject to regulation under the MMPA, Congress clearly envisioned the continuation of that fishing activity within the regulatory framework established by the statute.

In sum, the MMPA did not prohibit salmon gillnet fishing; rather, it *allowed* fishing to continue while at the same time placing a prohibition on marine mammal takings except to the extent that permits could be issued in accordance with statutory criteria for *each* species. Congress in fact contemplated precisely the anomalous situation that the court finds troubling. Maj. op. at 13-14. At the very

least, Congress enacted a statutory scheme that places in tension the goal of total elimination of marine mammal takings and the need for a workable permit system administered in accordance with statutory criteria. *Chevron* and its progeny teach that we should defer to the reasonable resolution of that tension by the agency charged by Congress with the task of resolving it.

II

In my view, NOAA's interpretation and administration of the MMPA is eminently reasonable. The Center for Environmental Education ("CEE") reasons, however, that NOAA's interpretation of the MMPA "create[s] an entire class of unreviewable takings fully outside the regulatory structure of the MMPA" because "the Secretary's approach allows takings *whether or not* the statutory requirements are met." CEE Brief at 33. The argument is essentially that once incidental takings are "allowed," if not "permitted," then one is entirely outside the statutory scheme and its rigorous criteria aimed at guiding permit issuance.

But NOAA has administered the Act in no such manner. Although rejecting the ALJ's recommendation to issue a permit for the taking of fur seals, NOAA explicitly credited the ALJ's finding that the number of seals that would nevertheless be unavoidably taken would not adversely affect that species' population. Decision of the Under Secretary at 2, 10, Appellant App. at 128, 136. As we indicated above, note 4 *supra,* NOAA took cognizance of the fact that the population of Commander Islands fur seals is subject to a managed commercial harvest of 4,000 to 5,500 animals per year. NOAA's determination is also supported by its estimate that native Alaskans would take several thousand Pribilof Islands fur seals for subsistence

in 1987. 52 Fed. Reg. 26479 (July 15, 1987) (final notice); 52 Fed. Reg. 17307 (May 7, 1987) (notice and request for comment). NOAA concluded, reasonably, that the subsistence harvests of 1985 and 1986 had no effect on the growth of the population to higher levels. 52 Fed. Reg. at 26482. It was therefore reasonable for NOAA to conclude that the possible taking of only 45 fur seals per year—with a mortality rate of perhaps 10 of those—by the Federation was entirely consistent with the overall policies and purposes of the MMPA.

III

We have seen thus far that Congress did not speak to the precise issue that the court decides today; that the MMPA's text, structure, and legislative history support the agency's interpretation; and that NOAA's administration of the statute represents a reasonable resolution of conflicting policies embodied in the statute. It is evident, then, under *Chevron's* two-step analysis that judicial deference to the agency's reasonable interpretation is required. But in the present setting, several additional considerations point powerfully in favor of deferring to the agency's interpretation.

First, NOAA is charged with administering a statute which sets forth a *variety* of objectives (including a workable permit system, as described above). Under the MMPA, NOAA is obliged to take into account the following factors in adminstering the permit system:

> (1) existing and future levels of marine mammal species and population stocks;
>
> (2) existing international treaty and agreement obligations of the United States;
>
> (3) the marine ecosystem and related environmental considerations;

(4) the conservation, development, and utilization of fishery resources; and

(5) the economic and technological feasibility of implementation.

§ 1373(b). Today, the court features only the first factor in its analysis. The agency, in contrast, is not at leisure to stop at factor number one, for it has a statutory duty to consider all five. The agency, in short, cannot call it a day upon completing only one-fifth of the Congressionally ordained exercise.

Second, the agency is undeniably *maximizing* the overall goal of the Act to reduce or eliminate marine mammal takings by the reasonable exercise of its regulatory power. In contrast, the result of today's decision raises the danger that the Japanese will terminate their treaty obligations under the INPFC. The overall result may very well be, ironically, reduced protection for marine mammals, if the Japanese fleet withdraws from fishing activity subject to NOAA regulation. That unhappy state of affairs would be but another testament to the recurring reality of unintended consequences. But there is another, closely related element as well. Because the statute specifically directs the agency to take cognizance of U.S. treaty obligations, it is particularly appropriate that the Executive be afforded reasonable latitude in administering a statute that touches on the arena of foreign policy.

Third, the issue before us is not a question of the agency's power (in the sense of its jurisdictional reach) in which deference to the agency might be less justified. *See ACLU v. FCC,* 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987); *American Mining Congress v. EPA,* 824 F.2d 1177, 1186-87 (D.C. Cir. 1987). There is thus no reason to assume that NOAA is being less than dispassionate in trying to balance the competing considerations before it. *Cf.*

Schwabacher v. United States, 334 U.S. 182, 204 (1948) (Frankfurter, J., dissenting) ("Since the [ICC] disclaims rather than asserts a power, there is all the more reason to feel assured of its disinterestedness and to resolve ambiguity in favor of its choice of construction.") Rather, the statute requires the agency to apply the law to the facts at hand and to make judgments based upon a number of statutory criteria. What is more, the statutory scheme relies heavily upon the agency's technical expertise.

Finally, Congress has created an additional loop in the decisionmaking process in order better to assure the wisdom of NOAA's permit decisions. The MMPA requires NOAA to consult with the Marine Mammal Commission ("MMC") before prescribing regulations governing takings. § 1373(a). The MMC is a separate advisory body whose members are appointed by the President (with the advice and consent of the Senate) from a list of qualified individuals who must be unanimously agreed upon by heads of other specified Executive Branch agencies. § 1401. The statute thus provides a mechanism to ensure that individuals will provide their independent judgment and give environmental concerns their priority. The MMC has concurred fully with NOAA's interpretation of the Act. Reply Brief of the Marine Mammal Commission Before the United States Department of Commerce. National Oceanic and Atmospheric Administration, and National Marine Fisheries Service 30-31. Appellant App. at 311-12 (recommending that NOAA issue a permit for the taking of Dall's porpoise but deny permits for the fur seals and sea lions that would inevitably be taken). Moreover, in this particular case, NOAA consulted fully with the MMC and accepted the MMC's recommendation not to issue a permit for the taking of fur seals over the contrary recommendation of the ALJ. Decision of the Under Secretary 10, 14, Appellant App. at 136, 140. The advisory

body's ratification of the agency's approach is thus but another factor suggesting the wisdom—quite apart from the legal requirement—of *Chevron* deference.

IV

The court discerns support for its holding in two subsequent amendments to the MMPA. With all respect, the court misses the mark in assuming that Congress' action in these areas has a significant bearing on its intentions in the very different context of salmon gillnet fishing operations.

A

The court reasons that the Federation's problems would be solved if the *de minimis* exception embodied in section 1371(a)(4)(A) had been enacted as originally proposed—that is, without the limitation to "citizens of the United States." Maj. op. at 14. The court infers from Congressional silence that Congress' intent as to this very different issue is so clear as to foreclose the agency's interpretation. In so reasoning, the court misapprehends, I believe, the purposes animating Congress in enacting the amendment.

Congress enacted this section because the procedures leading to an incidental take permit under section 1374 were so burdensome that many fishing operators would not apply for a permit authorizing their few incidental takes. H.R. Rep. 97-228, 97th Cong., 1st Sess. 14 (1981). The exemption is thus activity-based. "Unless a particular activity takes only small numbers of marine mammals, and that taking has a negligible impact on the species, the new provisions of sections 101(a)(4) and (5) [16 U.S.C. § 1371(a)(4) and (5)] are not applicable to that activity." *Id.* at 19. This section was not intended to apply to the situation faced by groups such as the Federation, which seeks general permits to take thousands of marine mam-

mals yearly. *See, e.g.*, 49 Fed. Reg. 1925 (1984) (General Permits issued to the North Pacific Fishing Vessel Owners' Association (3,605 mammals), Pacific Coast Federation of Fishermen's Association (2,790 mammals), and Japan (6,189 mammals)). As to the issue before us, the *de minimis* exception is, with all respect, a fish out of water.

B

The court reasons that Congress made special provision for purse-seine tuna fishing, loosening MMPA requirements by amending § 1371(a)(2) in 1981. Maj. op. at 14-15. The court, I believe, misapprehends the import of the 1981 amendment.

The language cited by the court does nothing to take purse-seine tuna fishing out of the rigorous permit requirements of the MMPA. Rather, the statute commands that fishing operators must make "best efforts" to reduce *killing* or *injuring* marine mammals, even if a permit for their *taking* has issued. Far from representing a "statutory relaxation," *id.*, the amendment mandates an additional goal to which the MMPA—heretofore concerned with regulating only "takings"—had not concerned itself. The change made eminent sense in the purse-seine fishing industry because the techniques used there meant that marine mammals, even though "taken" within the statutory meaning of the term, might easily be set free by use of appropriate techniques. The amendment, in effect, mandates that those techniques be used.[6]

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[6] In purse-seine fishing, two boats set a net around a school of fish. After the net encircles the school, the bottom of the net is tied together, entrapping the fish within. At that point, marine mammals caught within the net are "taken" within the meaning of the MMPA, but in many cases can still be let free without injury.

V

As I have attempted to demonstrate, powerful indications abound pointing in favor of the agency's interpretation in this case. Above all, had Congress wanted to stop all fishing operations in the Bering Sea in order to protect marine mammals from incidental takings, it could readily have done so. Instead, Congress enacted a statute creating a species-based permit system as an integral part of its provisions. Because today's decision robs those provisions of meaningful content and substitutes for a reasonable agency interpretation a rigid judicial construction of the statute, I am constrained respectfully to dissent.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-1351

FEDERATION OF JAPAN SALMON FISHERIES COOPERATIVE ASSOCIATION, PETITIONERS

v.

MALCOM BALDRIGE, ET AL., RESPONDENTS

Civil Action No. 87-1440

KOKECHIK FISHERMEN'S ASSOCIATION, ET AL., PETITIONERS

v.

MALCOM BALDRIGE, ET AL., RESPONDENTS

Civil Action No. 87-1472

CENTER FOR ENVIRONMENTAL EDUCATION, ET AL., PETITIONERS

v.

MALCOM BALDRIGE, ET AL., RESPONDENTS

[Filed June 15, 1987]

MEMORANDUM OPINION

These consolidated cases involve the validity of a May 14,,1987, final decision of respondent Secretary of Commerce ("Secretary"). That decision approved the application of the Federation of Japan Salmon Fisheries Cooperative Association ("the Federation" or "the Japanese Federation") for an incidental take permit under section 1374 of the Marine Mammal Protection Act, 16 U.S.C. § 1361-1407 (1972) ("MMPA"), and adopted regulations pursuant to section 1373 of the MMPA which authorize Federation members to take a total of 6,039 Dall's porpoise within the United States' 200 mile fishery conservation zone during the next three years. 50 C.F.R. 216.24(d)(5)(vii).

Presently before the Court are the motions of petitioners in each of the three cases for a preliminary injunction. Upon consideration of the supporting and opposing memoranda, oral argument of counsel, and the record submitted to the court to date, the motions of the petitioners in Kokechik Fishermen's Association, *et al.* and Center for Environmetal Education, *et al.*, shall be granted. The motion of the Japanese Federation shall be denied as moot.

Historical Background

Kokechik alleges that Japanese fishing vessels began fishing for salmon with gillnets in Alaskan waters as early as 1904. By 1937, prompted by complaints from fishermen in the United States that Japanese gillnets were destroying Alaskan salmon stocks, the United States Senate passed a resolution that demanded that Japanese vessels stop salmon fishing off the coast of western Alaska. *See* 81 Cong. Rec. 2670, March 24, 1937. Although the Japanese gillnet salmon fishery in the Bering Sea and North Pacific

Ocean was suspended during the Second World War, at the urging of Senator Warren Magnuson, President Truman in 1945 executed a presidential proclamation authorizing the U.S. Government to establish conservation zones in the areas of the high seas contiguous to the coasts of the U.S. where fishing activities had been or in the future might be developed and maintained on a substantial scale. 59 Stat. 885 (Sept. 28, 1945). An explicit purpose of the proclamation was to "protect coastal fishery resources from destructive exploitation . . . ." *Id.* The Truman proclamation was never implemented, however.

Between 1937 and 1952 Kokechik alleges that Japanese vessels fished extensively for salmon, including salmon of United States origin, in the Bering Sea and North Pacific Ocean and entrapped and drowned significant numbers of various marine mammals in their gillnets. *See* Kokechik Petition for Review at 8-9. The Federation denies that significant numbers of marine mammals or other animals were taken by the Japanese gillnet fishery prior to 1952 and denies that significant numbers of marine mammals or other animals were taken by the Japanese gillnet fishery between 1952 and 1976. *See* Answer of Federation at 3.

The International Convention for the High Seas Fisheries of the North Pacific Ocean, 4 U.S.T. 380, T.I.A.S. No. 2786 ("INPFC"), was signed by Canada, Japan, and the United States in 1952 and entered into force in 1953. The chief motivation behind the INPFC was the desire of the U.S. and Canada to minimize the interception of North American origin salmon by Japan's salmon fishery in the North Pacific and Bering Sea. This was accomplished by the initiation of the "absention principle" under which Japan agreed to astain from fishing for salmon east of longitude 175° West in the North Pacific Ocean and Bering Sea.

The Magnuson Fishery Conservation and Managment Act of 1976 ("Magnuson Act") established a 200 mile fishery conservation zone ("FCZ" or now known as the Exclusive Economic Zone "EEZ") surrounding the coast of the U.S. Pursuant to the Magnuson Act, no foreign vessel, including vessels operated by Federation members, may fish within the zone for fish stocks that are fully utilized by U.S. fishermen. This Act directed the Secretary of State, in cooperation with the Secretary of Commerce, to initiate the renegotiation of any treaty pertaining to fishing within the FCZ and for certain other fishery resources beyond the FCZ, which were inconsistent with its provisions. As the 1952 INPFC was inconsistent in several respects with the Magnuson Act, it was determined necessary to renegotiate or terminate the INPFC.

On February 10, 1977, the U.S. gave notice of its intention to terminate the INPFC in one year unless it was renegotiated in that period. An agreement on a Protocol to the INPFC was signed by Canada, Japan, and the U.S. on April 25, 1978. This Protocol moved the abstention line to 175° East longitude, with the exception of a portion of the north central Bering Sea outside the U.S. FCZ. Additional areas where North American salmon and marine mammals are protected from fishing by Japan under the INPFC include approximately 775,000 square miles outside the U.S. FCZ. The Japanese mothership fleet, in return, is allowed to fish for salmon of primarily Asian origin in 70,000 square miles inside the U.S. FCZ between June 10 and July 31 of each year.

As part of the newly negotiated INPFC, all parties agreed to establish a program of coordinated scientific research as well as to establish procedures to facilitate observation of the mammal stock and fishing operations. Japan and the U.S. further agreed to a research program designed to reduce or eliminate the incidental take of

marine mammals and assess the distribution, abundance, and status of Dall's porpoise taken incidentally in the high seas salmon fishery. The study included the biology, ecology, reproduction, food habits, and age structure of the mammals.

At the time the INPFC was renegotiated, the U.S. was aware that if Federation members were allowed to set their gillnets within the U.S. conservation zone, Dall's porpoise, fur seals, harbor propoise, northern right whale dolphin, Pacific white-sided dolphin, common dolphin, sea lions, and other marine mammals would be entangled or drown in the nets set by the Japanese. For that reason, in 1978, the same year the Senate ratified the Protocol than amended the INPFC, the Congress amended the North Pacific Fisheries Act.

The North Pacific Fisheries Act of 1954, 16 U.S.C. § 1021 *et seq.* ("NPFA"), implemented the INPFC in the U.S. It was amended in 1978 to reflect the new Protocol and its Annex concerning the marine mammal research. At that time, in accordance with the North Pacific Fisheries Act and the INPFC, the Japanese fishery was exempted from the incidental take permit requirements of the MMPA for a period of three years, during which time the U.S. and Japan agreed to study the effect of the salmon fishery on marine mammal populations and to work to reduce or eliminate incidental takings. Section 14 of the NPFA stated: "After June 9, 1981, the taking of marine mammals incidental to fishing operations by Japanese vessels within the fishery conservation zone shall be regulated pursuant to the Marine Mammal Protection Act of 1972 . . . ." As the statutory waiver granted in the North Pacific Fisheries Act under which the Japanese operated was to expire in 1981, the Federation submitted an application for an incidental take permit under the Marine Mammal Protection Act on January 19, 1981.

This application requested a general permit for three years (1981 to 1983).

The Marine Mammal Protection Act

Although the U.S. has allowed the Federation to enter the U.S. FCZ and set gillnets for salmon, its ability to do so is not unconditional. The Federation and the Japanese government acknowledge that Federation members may not fish in the U.S. FCZ unless, while in the zone, they comply with the laws of the U.S. The MMPA is one of the laws Federation members must observe while fishing for salmon within the U.S. fishery conservation zone. It is that law which is at issue in this case.

Congress expressly found and stated in the MMPA that "certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities . . . . [S]uch species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population . . . ." MMPA § 1361.*

Section 1371 of the MMPA imposes a moratorium on the "take" of all marine mammals in water subject to the jurisdiction of the U.S., including the Bering Sea and

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* Pub. L. 95-426, Title VI § 602, Oct. 7, 1978, 92 Stat. 985 provided that: "It is the sense of the Congress that the President should convey to all countries having an interest in cetacean sea life the serious concern of the Congress regarding the continuing destruction of these marine mammals (highlighted by the recent slaughter of dolphins in the Sea of Japan by Japanese fishermen) and should encourage countries . . ." to engage in discussions, exchange information, cooperate in establishing an international cetacean commission and adopt comprehensive marine mammal protection legislation.

North Pacific Ocean. The term "take" is defined by the MMPA to mean "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." MMPA § 1362(12). A moratorium is defined as "a complete cessation of the taking of marine mammals. . . ." MMPA § 1363(7). Defendant Secretary of Commerce has interpreted the term "harass" to include "the restraint or detention of a marine mammal, no matter how temporary." 50 C.F.R. § 216.3. Consequently, when a marine mammal entangles itself in a gillnet, even if the mammal manages to struggle free before it drowns, the Federation catcherboat captain who authorized the net to be set has committed a "taking" as the term is defined in the MMPA.

In recognition of the fact that marine mammals may frequently be taken in gillnets set to take fish, section 1371(a)(1) of the MMPA authorizes the Secretary to waive the moratorium and allow marine mammals to be taken incidentally in the course of commercial fishing operations. Several statutory criteria must be met and findings made in order to assure the primary protection of marine mammal populations, which is guaranteed by the MMPA, before an incidental take permit may be issued. MMPA §§ 1371-75.

Regulations implementing the MMPA and establishing procedures by which the general moratorium on the taking of marine mammals in connection with commercial fishing operations may be waived, have been promulgated by the Secretary in 50 C.F.R. Part 216. These regulations establish the requirements which must be met before regulations waiving the moratorium may be promulgated and a marine mammal take permit may be issued, and they also establish the procedures which must be followed in the formal administrative hearing which must be held on any application for a marine mammal take permit. 50 C.F.R. Part 216, Subparts C and G. Permits may be

granted if it is shown, on the basis of "the best scientific evidence available", that the taking will not be to the disadvantage of the stocks involved and will be consistent with the purposes and policies of the MMPA. MMPA § 1373(a). Section 1371 states: "In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." MMPA § 1371(a)(2).

In 1981, after formal hearings before an Administrative Law Judge, the National Marine Fisheries Service (the delegate of the Secretary of Commerce with authority to grant permits under the MMPA) agreed with the ALJ's recommended decision to grant a three-year permit with annual quotas for 5,500 Dall's porpoise, 450 Northern fur seals, and 25 Northern sea lions. 46 Fed. Reg. 27056 (May 15, 1981).

An environmental group challenged the issuance of this permit in *Friends of Animals v. Baldridge,* No. 81-1547 (D.D.C. 1982). No temporary restraining order or preliminary relief was sought in that case; consequently, one year of fishing under the permit took place and a second was imminent, prior to the court's consideration of the merits. *Id.,* slip op. at 4. At issue was the meaning of the "best scientific evidence available" standard.

The court held that if the weight of authority suggests a certain figure is most likely, that figure should be adopted. *Id.* at 8. The court stated that "[a]lthough the Court does not necessarily approve of decisions, based as this one was, on a lack of data, the Court cannot say that the choice was unreasonable, especially when the choice was supported by the overwhelming weight of scientific opinion." *Id.* at 10-11. It was pointed out that the "pervasive lack of empirical data underlying the variables . . . used in

determining that the permit to take porpoise would not be to the disadvantage of the species is extremely troubling." *Id.* at 13.

In 1982, Congress, for a second time, amended the North Pacific Fisheries Act to extend the Federation's permit through June 9, 1987. NPFA § 1034(b). These amendments also require the Federation to assist as requested in meeting the objectives of the research program agreed to by the U.S. and Japan and to provide appropriate funding to carry out a joint research program on Dall's porpoises. In April 1986 the parties to the INPFC, after extensive negotiations, adopted new measures intended to reduce further the incidental take of U.S. origin salmon by Japanese high seas mothership and landbased fisheries. The measures provide for a phasing out of the Japanese mothership fleet from various specified portions of the Bering Sea over the next nine years. Changes are also made in the landbased fishery as well as in an intensification of research relating to the contingent origin of salmon.

The Federation's MMPA permit, as extended by the North Pacific Fisheries Act, expired on June 9, 1987. The Federation, on July 21, 1986, applied for a new permit authorizing its members to take 5,500 Dall's porpoise, 450 fur seals, and 25 sea lions during each of the next five years. 51 Fed. Reg. 9674 (August 16, 1986). No request was made to take harbor porpoise, common dolphin, and other marine mammals likely to be taken if Federation members are allowed to set their gillnets within the U.S. fishery conservation zone.

The Method of Gillnet Fishing

If the challenged permit is upheld, on June 10, 1987, 129 catcherboats operated by Federation members will enter

the waters of the U.S. fishery conservation zone in the area of the Bering Sea and North Pacific Ocean surrounding the western end of the Aleutian Islands off the coast of Alaska. Each night at dusk each catcherboat will set a nylon monofilament gillnet 9.3 miles long and 26 feet deep. A total of 1,200 miles of net length will be set. This fishery will set out and retrieve 129 of these over nine mile long gillnets every night of the approximately two month fishing season. In addition to catching immature salmon, the nets entangle Dall's porpoises and other marine mammals, including depleted populations of northern fur seals as well as sea birds, sea lions, harbor porpoise, northern right whale dolphin, and common dolphin, causing death or serious injury to many of the individual marine mammals. *See generally* National Marine Fisheries Service, U.S. Dept. of Commerce, Final Environmental Impact Statement and Economic Impact Analysis on the Incidental Take of Dall's Porpoise in the Japanese Salmon Fishery (May 1987) ("Final EIS").

Between June 10 and July 31, 1987, Federation members are authorized to set 9.3 miles of net as many as 6,020 times. Each time they do so, it is inevitable that some protected marine mammals will be entangled in the nets. Other than not setting their nets at all, there is nothing the captains and crews of Federation catcherboats can do to avoid entangling and drowning marine mammals and sea birds while fishing for salmon. *See* testimony of the Federation's expert witness, Horoshi Ogiwara, an experienced fleet commander. *Kokechik* Brief at 11.

Identity of the Parties

In the *Federation of Japan Salmon Fisheries v. Baldridge* case filed in this court on May 20, 1987, Civ. No. 87-1351, plaintiff sought review against respondents

Secretary of Commerce and Undersecretary for Oceans and Atmosphere and to declare illegal, enjoin, and set aside certain actions of the respondents purportedly taken under the MMPA. On May 22, 1987, the Federation moved for expedited consideration of their petition, and on June 1, moved for a preliminary injunction. Petitioner is the Japanese Federation, a nonprofit cooperative association representing the Japanese high seas mothership salmon fishery. Respondents are the Secretary of Commerce, Malcolm Baldridge, the federal official charged with responsibility for granting, modifying, suspending, or revoking permits for fishing vessels under the MMPA, and Anthony Calio, the Undersecretary of Commerce for Oceans and Atmosphere, who is delegated authority by the Secretary to carry out the functions described by the MMPA.

In civil action number 87-1440, the Kokechik petitioners filed a complaint and motion for preliminary injunction on May 27, 1987, as a case related to the Federation case already filed with this Court. The Kokechik petitioners also sought review of the action taken by the Secretary of Commerce, in which a permit was issued and regulations adopted authorizing Federation members to take Dall's porpoise while fishing for salmon in the 200 mile U.S. fishery conservation zone, the same action challenged by the Federation in their case. Kokechik sought a declaratory judgment and preliminary and permanent injunction.

A third related case, *Center for Environmental Education v. Baldridge,* Civ. No. 87-1472, was filed with this Court one day after the Kokechik case, on May 28, 1987. Malcolm Baldridge, the Secretary of Commerce, Anthony Calio, the Undersecretary for Oceans and Atmosphere, William E. Evans, the Assistant Administrator for Fisheries, National Marine Fisheries Service, the U.S. Department of Commerce, the National Oceanic and At-

mospheric Administration, and the National Marine Fisheries Service were named as defendants. All of the plaintiff organizations participated extensively in the administrative proceeding before the U.S. Department of Commerce relating to the Japan Federation's application for a marine mammal take permit for its gillnet salmon fishery, and all of them opposed the issuance of the permit by the Secretary. All allege that the issuance of the permit adversely affects their organizational interests, as well as the use and enjoyment by their members of the marine environment and the marine mammal and sea bird species affected by the issuance of the permit.

The Administrative Proceedings

Pursuant to the regulations implementing the MMPA, an ALJ conducted a formal hearing on the Federation's application in Seattle, Washington, in December 1986. The Kokechik Fishermen's Association, the Qaluyaat Fishermen's Association, all the petitioners in the CEE case, and the Japanese Federation participated as parties in the hearing. Subsequent to the formal administrative hearing, respondent NOAA on December 30, 1986, issued a proposed notice, pursuant to 50 C.F.R. Part 216, for the designation of the North Pacific fur seal—Pribilof Island Population, as "depleted" under the MMPA. MMPA § 1362(1). 51 Fed. Reg. 47156. A depleted population of marine mammals is one which has been determined to be below its optimum sustainable population. MMPA § 1362.

After consideration of over 3,500 pages of testimony, exhibits, and the receipt of extensive legal briefs, ALJ Hugh J. Dolan recommended on March 6, 1987, that a five (5) year permit be issued to the Japanese Federation that would allow 1,750 Dall's porpoise and 45 northern fur

seals from the Commander Islands stock to be killed or seriously injured during 1987. For each of the four subsequent years, the ALJ recommend that the quota for Dall's porpoise be reduced by five per cent from the previous year. The ALJ also made findings and recommendations concerning permit terms and conditions and further research needs. Exceptions were filed to the recommended decision of the ALJ.

On May 28, 1987, James E. Douglas, Jr., the Acting Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service, published the final decision of the Department of Commerce, as signed by Undersecretary Calio on May 14, 1987, in the Federal Register. 52 Fed. Reg. 19874 (May 28, 1987). That action amended 50 C.F.R. Part 216 to allow the Japanese Federation to take 6,039 Dall's porpoise in the next three years of which no more than 448 may be taken from the Bering Sea and no more than 2,494 may be taken from the North Pacific Ocean in any single calendar year. The ALJ's recommendation that the permit include fur seals was not adopted. Additionally, incidental take levels authorized by the subpart were reduced proportionately in the event that the Soviet Union reduced salmon quotas for 1988 or 1989 by more than 10 percent of the 1987 quota.

The Challenges to the Secretary's Action

The Japanese Federation:

The Federation claims that the quotas were based on an assumption that the fishing effort of the Federation in the FCZ will be reduced because of a reduction of the number of Federation vessels. It is asserted that based on the administrative record the decision to reduce the Dall's porpoise quotas to the levels of the permit is erroneous. The Federation also claims that despite the fact that the ALJ

indicated that the Commander stock of Northern fur seals is above the lower boundary of OSP and thus could be taken, the Undersecretary ruled that there was not enough evidence to make such an OSP finding and that the denial of a permit for the taking of Commander stock fur seals is erroneous.

The Undersecretary also imposed a condition on the permit that to the extent the National Marine Fisheries Service is capable of placing U.S. marine mammal observers on vessels in the Japanese landbased salmon and high seas gillnet fleets, they must be readily accommodated. This decision is challenged as erroneous. These errors are alleged to be a violation of the Administrative Procedure Act, 5 U.S.C. § 706(2), and it is alleged that they will cause irreparable injury to the Federation and its members.

The Kokechik Petitioners:

These petitioners make several claims. In sum, they assert that the Secretary knows, and it has been established in respondent's Final EIS, that fur seals will be entrapped in at least nine percent of the gillnet sets utilized by the Japanese Federation, some of which will be from the depleted Pribilof Island stock that respondent concedes is depleted. Despite the knowledge that approximately 541 fur seals and an undetermined number of harbor porpoise, northern right whale dolphin, Pacific white-sided dolphin, common dolphin, and sea lions will in fact inevitably be taken by the Federation in violation of the MMPA, petitioners allege that respondents have unlawfully refused to enforce the non-discretionary provisions of the MMPA. *See* MMPA § 1377.

Rather than informing the Federation that its members will not be allowed to set gillnets, and, in so doing violate

the MMPA within the U.S. FCZ, the Secretary's decision expresses regret that catcherboat captains observed violating the MMPA may have to pay a fine: "Under these circumstances, where a negligible number of non-permitted takings will occur, and where the stock does not require the absolute protection provided by the MMPA, it is unfortunate that those who must pay the penalties will be determined largely by chance." 52 Fed. Reg. 19878 (May 28, 1987). The Secretary's decision then goes on to state that he "intends to seek amendment of the MMPA to permit incidental, but not intentional takings of small numbers of marine mammals, by vessels engaged in commercial fishing if such takings will have a negligible impact on the species and stock." *Id.* This proposed policy of the Secretary has been referred to by respondents as an "accidental take" policy.*

Petitioners claim that the Secretary has a mandatory duty under section 1377 of the MMPA which states "the Secretary shall enforce the provisions of this subchapter." MMPA § 1377(a). Petitioners' argument is that the Secretary's issuance of a permit for Dall's porpoise but not for other marine mammals he foreseeably knows will inevitably be taken along with the Dall's porpoise is a violation of that statutory mandate.

Petitioners also assert several other procedural claims with respect to the administrative process in this case. First, it is claimed that the Environmental Impact Statement failed to include all reasonable alternatives as is required by 42 U.S.C. 4332(2)(C), in that the alternative of pursuing Congressional amendment of the MMPA, which the

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* When questioned at oral argument about the propriety of such a policy in light of the clear import of the MMPA, counsel, in an apparent last minute change of position, asserted that "we are not trying to come under the rubric of the accidental take policy."

Secretary did twice in the past and has indicated in his decision he intends to do in this very case in the future, was not included in the EIS in violation of 42 U.S.C. 4332(2)(E).

Second, petitioners allege that the Secretary has a duty to make a decision pursuant to the procedures set forth in 40 C.F.R. 1506.10 which prohibits the Secretary from making a final decision until 30 days after the publication of a notice in the Federal Register announcing that the EIS has been filed, unless a finding is made that it is in the best interest of the United States Government to waive the 30 day waiting period. Here, a decision was made without awaiting the required 30 days or obtaining the statutory waiver.

Lastly, it is alleged that pursuant to Section 1374(d)(3) of the MMPA, the Secretary may not issue a permit or adopt regulations authorizing takings of marine mammals unless the Secretary first determines that the best scientific evidence available was presented at the hearing held before the ALJ on the permit application. Petitioners assert that in this case the evidence was not the best scientific evidence available and that as a result the decision to issue the permit was arbitrary and capricious and an abuse of discretion by the ALJ.

The CEE Petitioners:

The CEE petitioners allege that the Secretary failed to comply with the provisions of the MMPA in the decision-making process in this case in various respects: by the issuing of a marine mammal permit to the Japanese Federation that will allow the taking of Pribilof Island fur seals, a depleted species protected under the MMPA; by committing several major violations of the strict procedural requirements of the MMPA and the APA, which govern the

conduct of this action; by failing to conduct the required formal administrative proceeding entirely on the record and without any *ex parte* communications, as the MMPA requires; and by failing to comply with the requirement of NEPA.

Analysis

Under this jurisdiction's long standing test in deciding whether to grant an injunction "the District Court should consider (1) the plaintiff's likelihood of prevailing on the merits, (2) the threat of irreparable injury to the plaintiff in the absence of injunctive relief, (3) the possibility of substantial harm to other interested parties from the injunctive relief, and (4) the interests of the public." *Foundation on Economic Trends v. Heckler,* 756 F.2d 143, 151 (D.C. Cir. 1985) (citing *WMATC v. Holiday Tours,* 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958)). It is this test which must now be applied to the facts.

(1). Petitioners' likelihood of prevailing on the merits:

The petitioners assert different interests and have made different claims; thus, their likelihood of prevailing must be examined individually. Looking first at the Kokechik petitioners, the Court finds their claims to be meritorious and that they have a substantial likelihood of success on the merits. It is, therefore, not necessary to reach the other claims asserted by the several different petitioners at this preliminary stage.

The full administrative record has not yet been filed with the Court; however, certain documents contained therein, such as the recommended decision of the ALJ, the Final Environmental Impact Statement, the notices

published in the Federal Register, the final decision of the Secretary, and the affidavits of several parties (some of whom testified at the administrative hearing) are presently before the Court. This record is adequate to determine the proper interpretation of the MMPA and whether the MMPA has been properly interpreted by the Secretary.*

Returning to Kokechik's primary claim, our inquiry must focus on whether the Secretary's interpretation, as expressed in the regulation that grants the permit at issue to the Japanese Federation, is reasonable and consistent with the statutory language, legislative history, and purpose of the MMPA. "Our inquiry is informed by an awareness that the regulation is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act." *Whirlpool Corp. v. Marshall,* 445 U.S. 1, 11 (1980). "In reviewing an agency's interpretation of a statute, a court should first examine the language of that statute to determine whether the interpretation falls within the statute's plain meaning." *General Motors Corp. v. Ruckleshaus,* 724 F.2d 979, 989 (D.C. Cir. 1983). If the meaning of the statute is clear, "that is the end of the matter, for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.,* 106 S.Ct. 681, 686 (1986) (citation omitted).

* The claims which require the Court to review the administrative record to determine if it contained substantial evidence to uphold the Secretary's decision are Kokechik's claim relating to the use of the best scientific evidence at the administrative hearing, and the Federation's claim that the record does not contain substantial evidence to support the final decision made. Even with respect to those claims, which are founded in the APA and thus governed by the APA standard of review, the Court is able to resolve the issue of whether success on the merits is likely based on the present record and the argument of counsel.

The MMPA has been examined and interpreted by both the District Court and the Court of Appeals for the District of Columbia Circuit in *Committee for Humane Legislation, Inc. v. Richardson,* 414 F. Supp. 297 (1976), aff'd. 540 F.2d 1411 (1976). This Court is bound by and adopts that interpretation and its reasoning which will not be repeated at length here. It was, however, observed in *Richardson* that "[t]he primary purpose of the MMPA is to protect marine mammals; the Act was not intended as a "balancing Act" between the interests of the fishing industry and the animals." *Richardson,* 414 F. Supp. at 306; *accord,* 540 F.2d at 1148. "The interests of the marine mammals come first under the statutory scheme, and the interests of the industry, important as they are, must be served only after protection of the animals is assured." 414 F. Supp. at 309.

Here, the Secretary has interpreted the MMPA so as to allow him to issue a permit to the Federation to take one species of mammal, Dall's porpoise, for which the required finding of no disadvantage based on optimum sustainable population has been made, even though the Secretary knows other species will also be taken and as to those other species no such finding has been made. In his decision the Secretary explains that under the circumstance where "a negligible number of nonpermitted takings will occur," a permit will be issued even though the statutory provisions to issue a permit for those species have not been met and and penalties will be imposed upon those who are caught taking the mammals. 52 Fed. Reg. 19878 (May 28, 1987). The decision does not define "negligible" in numerical terms nor in terms of stock population.

It is noted that "Congress foresaw the possibility that, in a given situation, there would be a lack of scientific information as to whether a proposed level of taking would be to the disadvantage of the marine mammals involved",

Richardson, at 310, and that might result in an inability to find whether the stock was at its optimum sustainable population. " 'Before issuing any permit for the taking of a marine mammal, the Secretary must first have it proven to his satisfaction that *any* taking is consistent with the purposes and policies of the act—that is to say, that taking will not be to the disadvantage of the animals concerned. *If he cannot make that finding, he cannot issue a permit. It is that simple.' " Id.* (citing 118 Cong. Rec. 7686 (1972) (floor remarks)). This conclusion was found by the court to be supported elsewhere in the legislative history. *Id.*

In *Richardson,* the court also stated that Congress required in section 1371(a)(3)(A) and 1373(a) an explicit finding that a taking will not disadvantage the marine mammals involved prior to adopting such regulations because "only by knowing whether the population level would be reduced to a less-than-optimum level as a result of the taking could the agency determine whether such taking would be to the 'disadvantage' of the animals involved." *Id.* at 309-10. The Court of Appeals found that "the District Court had correctly interpreted the law as written." 540 F.2d at 1149.

The *Richardson* court cites a Marine Mammal Commission statement indicating that it could not find that "any number above zero" would satisfy the high burden required to be met to find no disadvantage to a particular stock. *Id.* at 305. In this case, the permit issued appears to be invalid under the MMPA because a finding that all the marine mammals the Secretary knows will inevitably be taken are at or above their optimum sustainable population level has not been made. Importantly, one of the marine mammals involved, the Pribilof Island fur seal stock, has been found by the agency to be depleted*. It is,

* "Depleted" is defined in the MMPA as "any case in which (A) the Secretary . . . determines that a species of population stock is below

by statutory definition, impossible for a Pribilof fur seal to be taken without disadvantaging the stock. Under the plain language of the MMPA and in accordance with the interpretation of the MMPA as stated in *Richardson,* the Secretary is not given discretion to determine that a taking will not disadvantage of stock unless the specifically required statutory finding regarding optimum sustainable population has been made. Congress has clearly made the determination as to when a stock will or will not be considered disadvantaged.

The MMPA imposes an absolute moratorium on all takings of marine mammals. The only way this moratorium may lawfully be ignored is through explicit Congressional action, as has been done for the Federation twice in the past, or by meeting the burden of proof** necessary to allow the agency to find that a single taking will not disadvantage a particular stock because that stock is within the range of its optimum sustainable population. For the Secretary to issue a permit for only the Dall's porpoise, when it is clear that other marine mammals are certain to be taken*** yet no permit was issued for such mammals because a finding could not be or was not made, appears, at this juncture, clearly contrary to the MMPA.

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its optimum sustainable population; (B) a State . . . determines that such species or stock is below its optimum sustainable population; or (C) a species or population stock is listed as an endangered spcies or a threatened species under the Endangered Species Act of 1973 [16 U.S.C. 1531 et seq.]." MMPA § 1362(1).

** The burden of proof with regard to showing that the taking will not disadvantage the species or stock is "by no means a light burden". *Id.* at 303.

* There is evidence based on the Federation's history of fishing in this area that these mammals have been taken in the past; thus, there is no reason to expect that they will not continue to be taken.

The Secretary argues that "even though a small number of marine mammals not authorized by a permit may be taken incidental to the salmon fishing, that fact does not preclude the issuance of a permit for other species." Respondent's Brief at 19. Contrary to that argument, it appears that if it is known by the Secretary that any mammals will be taken and there has been no finding that such mammal stock is within its optimum sustainable population no permit may be issued. Moreover, exactly what number of takings would constitute a "small number" is never identified by the respondents. This "*de minimus*" [*sic*] interpretation appears inconsistent with the plain meaning of the provisions of the MMPA. Congress has enacted a statute which does not recognize a *de minimus* [*sic*] taking and does not delegate to the Secretary authority to exercise discretion with regard to whether a taking is or is not *de minimus* [*sic*] or will or will not disadvantage a stock which is not at its optimum sustainable population. The standard which must be met before a taking is allowed is clearly spelled out in the MMPA and is mandatory.

The Secretary also indicates "his intent to enforce the taking provision through the civil penalty sanctions that Congress authorized in section 105 of the MMPA", and argues that "[t]he Under Secretary may exercise his discretion regarding the specific enforcement action to be instituted against anyone who takes marine mammals without a permit." Respondent's Brief at 19. Section 1377 of the MMPA, the enforcement provision of the statute, clearly states "the Secretary shall enforce the provisions of this subchapter." MMPA § 1377(a). The statutory duty of the Secretary is thus mandatory, not discretionary. To allow the Secretary to enforce the MMPA at his discretion by way of civil penalty in the case of unlawful takings, of which the Secretary had reason to expect, would result in rendering the strict requirements of obtaining a permit

under the MMPA meaningless. It would allow the violator to, in effect, purchase the right to violate a mandatory prohibition and allow the agency to engage in the sort of "fine utilitarian calculations" regarding the value of an endangered species the Court found unacceptable in *TVA v. Hill,* 437 U.S. 153, 187 (1977) and which under the MMPA have been precluded by Congress.

If the Secretary believes that a change of policy is essential to properly enforce the MMPA, the appropriate forum to initiate a change is in Congress, as the Secretary indicated in his final decision he in fact plans to do. He is not free, however, to implement that change by adopting an interpretation of the MMPA which conflicts with the language and intent of the statute.Nor is it for this Court to institute such a change in light of clear statutory purpose and mandate to do otherwise.

The Court need not consider the Federation's motion for preliminary injunction at this time since its decision on the Kokechik claims effectively renders the Federation's claims moot.

(2). The threat of irreparable injury to the plaintiff in the absence of injunctive relief:

The Kokechik petitioners claim that harbor porpoise, northern right whale dolphin, Pacific white-sided dolphin, common dolphin, sea lions, and other marine mammals will be taken in the fishery and that these takings will irreparably harm the stocks of those species. The CEE petitioners also allege irreparable injury to various marine mammal populations, including the depleted Pribilof Island fur seal. As was asserted by the Kokechik petitioners, the CEE petitioners also claim that, once marine mammal populations are harmed, the damage cannot be undone or compensated for. The MMPA requires the

agency to act as a trustee for these mammals and protect their interests. Unless a preliminary injunction is granted and the fishing permit rescinded so that the mandate of the MMPA may be properly carried out, irreparable harm will be done to the enumerated mammal populations.

Instruction is given by the Supreme Court in *Amoco Production Co. v. Gambell,* 107 S.Ct. 1396 (1987) which states "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable.* If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Id.* at 1404.

(3). The possibility of substantial harm to other interested parties from the injunctive relief and (4). The public interest:

Respondents argue that the issuance of a preliminary injunction will harm the United States should Japan choose to dishonor the INPFC and a destabilization of the international conservation regime result. This potential for harm, however, may be alleviated, should it occur, if Congress were to waive the requirements of the MMPA as to the Japanese Federation for this season as it has done for

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* At issue in *Amoco* were the exploration activities of the defendant oil company occurring Alaska which were alleged to violate a Federal statute providing protection for natural resources used for subsistence in Alaska. The district court declined to issue a preliminary injunction and the Supreme Court upheld that decision, after balancing the competing public interests involved, based on the finding that "[t]here, however, injury to subsistence resources . . . was not at all probable." *Id.* It was also found by the district court that the public interest favored the continued oil exploration and such exploration in this case would not cause the type of harm, a restriction in subsistence uses or resources, that that [Federal statute] was designed to prevent." *Id.*

the past six years. Moreover, the likelihood of harm is speculative.

The harm the Japanese Federation alleges will result from the issuance of a preliminary injunction appears to be strictly economic. The Federation will be unable to continue gillnet fishing operations within the FCZ pending further administrative or Congressional action.

When the irreparable harm to the marine mammal populations which will occur, if an injunction is not granted, is balanced against the harms alleged by respondent and the Federation, the interests of the marine mammal populations at stake in this case outweigh those of the other interested parties. This is especially apparent when the public interest in protecting the environment is considered. While this Court recognizes that " 'a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law,' " *Amoco*, at 1402, on these facts, unlike the facts of *Amoco*, after balancing the competing interests involved, the Court concludes that the purpose of the MMPA—to restore, maintain, and protect the integrity of the marine mammal populations—*would* be undermined by allowing the statutory violation to continue.

Unlike *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982),* here it is certain that unlawful takings of marine mammals will occur if the permit issued to the Japanese Federation is allowed to stand. Congress has already determined that such takings are harmful to the environment and this Court has no basis on which invalidate that determination. Furthermore, here, unlike the *Amoco* case, the public interest does not lie in protecting the economic well-

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* In *Romero-Barcelo* the District Court found that defendant's violations of the environmental statute at issue did not cause any "appreciable harm to the environment." *Id.* at 310.

being of the Federation fishermen, but, as clearly required by the MMPA, in carrying out Congress' will in protecting the marine mammals and maintaining the health and stability of the marine ecosystem.

/s/ NORMA HOLLOWAY JOHNSON
NORMA HOLLOWAY JOHNSON
United States District Judge

DATED: June 12, 1987

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-1351

FEDERATION OF JAPAN SALMON FISHERIES COOPERATIVE ASSOCIATION, PETITIONERS

v.

MALCOM BALDRIGE, ET AL., RESPONDENTS

Civil Action No. 87-1440

KOKECHIK FISHERMEN'S ASSOCIATION, ET AL., PETITIONERS

v.

MALCOM BALDRIGE, ET AL., RESPONDENTS

Civil Action No. 87-1472

CENTER FOR ENVIRONMENTAL EDUCATION, ET AL., PETITIONERS

v.

MALCOM BALDRIGE, ET AL., RESPONDENTS

[Filed June 15, 1987]

ORDER

Upon consideration of the motions for a preliminary injunction, the legal memoranda and exhibits, the argument of counsel, and consistent with the accompanying Memorandum Opinion, it is this 12th day of June, 1987.

ORDERED that the motion of the Federation be, and hereby is, denied as moot; it is further

ORDERED that the motions of petitioners Kokechik and the Center for Environmental Education be, and hereby are granted; it is further

ORDERED that Respondents be, and hereby are, preliminary enjoined from granting a permit to the Federation of Japan Salmon Fisheries Cooperative Association in the United States Exclusive Economic Zone; and it is further

ORDERED that this preliminary injunction shall not issue until appropriate bond is posted. Counsel are invited to submit recommendations as to the appropriate bond not later than noon on June 19, 1987.

/s/ NORMA HOLLOWAY JOHNSON
NORMA HOLLOWAY JOHNSON
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-1351

FEDERATION OF JAPAN SALMON FISHERIES COOPERATIVE ASSOCIATION, PETITIONERS

v.

MALCOM BALDRIGE, ET AL., RESPONDENTS

Civil Action No. 87-1440

KOKECHIK FISHERMEN'S ASSOCIATION, ET AL., PETITIONERS

v.

MALCOM BALDRIGE, ET AL., RESPONDENTS

Civil Action No. 87-1472

CENTER FOR ENVIRONMENTAL EDUCATION, ET AL., PETITIONERS

v.

MALCOM BALDRIGE, ET AL., RESPONDENTS

[Filed June 23, 1987]

ORDER

Federation of Japan Salmon Fisheries Cooperative Association, ("Federation") having moved for an order staying enforcement of the Order issued by this Court on June 12, 1987, pending an appeal therefrom to the United States Court of Appeals for the District of Columbia Circuit, and this Court having fully considered the motion and being of the opinion that the Federation is not entitled to the relief requested; it is this 23rd day of June, 1987,

ORDERED that the motion of the Federation for a stay of the Order of June 12, 1987, granting a preliminary injunction in favor of certain petitioners be, and hereby is, denied, it is, however, further

ORDERED that a temporary stay of twenty (20) days from the date of this Order be, and hereby is, granted to enable the Federation to seek a stay in the United States Court of Appeals.

/s/ NORMA HOLLOWAY JOHNSON
NORMA HOLLOWAY JOHNSON
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5239

KOKECHIK FISHERMEN'S ASSOCIATION, ET AL.

v.

SECRETARY OF COMMERCE, ET AL.

FEDERATION OF JAPAN SALMON FISHERIES
COOPERATIVE ASSOCIATION, APPELLANT

AND CONSOLIDATED CASE NOS. 87-5240, 87-5241,
87-5242, 87-5243, 87-5248 AND 87-5249

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Entered Feb. 16, 1988]

JUDGMENT

Before: Ruth B. Ginsburg and Starr, Circuit Judges, and Gesell,* District Judge

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in these causes is hereby affirmed and these cases are remanded, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court

/s/ CONSTANCE L. DUPRE
Constance L. Dupre
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5239

KOKECHIK FISHERMEN'S ASSOCIATION, ET AL.

FEDERATION OF JAPAN SALMON FISHERIES
COOPERATIVE ASSOCIATION, APPELLANT

v.

SECRETARY OF COMMERCE, ET AL.

[Filed May 11, 1988]

ORDER

Before: Ruth B. Ginsburg and Starr, Circuit Judges, and Gesell,* District Judge, United States District Court for the District of Columbia.

This matter is before the court for consideration of the Motion for Stay and the Petition for Rehearing of the Federal Appellants and of the Motion for Stay and the Petition for Rehearing of the Federation of Japan Salmon Fisheries Cooperative Association (Federation). Upon consideration thereof, it is

ORDERED, by the Court, that the motions for stay are denied, and it is

FURTHER ORDERED, by the Court, that the petitions for rehearing are denied.

For The Court:

Constance L. Dupre, Clerk

BY: /s/ ROBERT A. BONNER

Robert A. Bonner
Deputy Clerk

Circuit Judge Starr would grant the petitions for rehearing and the motion for stay of the Federation.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5239

KOKECHIK FISHERMEN'S ASSOCIATION, ET AL.

FEDERATION OF JAPAN SALMON FISHERIES
COOPERATIVE ASSOCIATION, APPELLANT

v.

SECRETARY OF COMMERCE, ET AL.

[Filed May 11, 1988]

ORDER

Before: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg and Starr, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges.

The suggestions for rehearing *en banc* of the Federal Appellants and the Federation of Japan Salmon Fisheries Cooperative Association have been circulated to the full court. The taking of a vote thereon was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestions. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc,* that the suggestions are denied.

For The Court:

Constance L. Dupre, Clerk

BY: /s/ ROBERT A. BONNER

Robert A. Bonner
Deputy Clerk

Circuit Judges Starr, D.H. Ginsburg and Sentelle would grant the suggestions for rehearing *en banc.*

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